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No. _____

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

HONORABLE DONALD E. DALTON; HONORABLE DAVID DALTON; HONORABLE FRED RUSH; HONORABLE CHARLES R. SCHROEDER; HONORABLE WILLIAM T. LOHMAR; HONORABLE RICHARD ZERR; and HONORABLE KATHIE GUYTON,
*Petitioners,*

v.

R.W.T., K.M.R., AND T.S.C. AND HONORABLE PAUL WILLIAM; HONORABLE CHARLES SCHWENDEMANN; HONORABLE PEGGY COPPAGE; HONORABLE DONALD BOEHMER; GUY L. KOESTER, Sheriff; CLISTON HILTON, Sheriff; DAVE JENKINS, Sheriff; RAYMOND J. GRUSH, Juvenile officer; and GERALD W. PAUL, Deputy Juvenile officer,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Are juveniles detained for reasons other than the commission of a criminal offense, entitled to the same level of constitutional protection as juveniles who are charged with the commission of an offense which, if committed by an adult, would constitute a crime?

2. Whether or not the two groups of juveniles identified in question 1 are treated the same for purposes of constitutional analysis, is either group entitled to a "hearing" on the issue of probable cause prior to their continued detention and, if so, what does this hearing entail?

3. Are members of the judiciary, acting in a judicial capacity, immune from entry of declaratory and injunctive relief and the ward of attorneys' fees pursuant to 42 U.S.C. § 1988?

4. Can a state court employee, consistent with the doctrine of judicial immunity, be enjoined or be the subject of an award of attorneys' fees, when the act enjoined and which forms the basis for the award of attorneys' fees is one performed pursuant to an order of a state court judge?

5. When allocating an award of attorneys' fees under 42 U.S.C. § 1988 among two groups of defendants and on two separate claims, is it permissible to base such allocation upon the relative importance of the two issues, as opposed to the amount of time reasonably expended by counsel for the prevailing party on each issue?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

### OPINION BELOW

The opinions of the District Court are unreported but are reprinted herein as appendices A, B, and C. The opinion of the United States Court of Appeals for the Eighth Circuit is as yet unreported but is reprinted herein as appendix D.

## JURISDICTION

Petitioners seek a review of a judgment issued by the United States Court of Appeals which affirms a judgment entered in the United States District Court for the Eastern District of Missouri in an action pursuant to 42 U.S.C. § 1983. The opinion of the Court of Appeals was filed on July 11, 1983. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND COURT RULES INVOLVED

Section 211.031, RSMo 1982 Supp., provides as follows:

**211.031. Juvenile court to have exclusive jurisdiction when—exceptions.**—1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

(1) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The parents or other persons legally responsible for the care and support of the child neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child shall not be construed as neglect when the treatment is recognized or permitted under the laws of this state; or

(b) The child is otherwise without proper care, custody or support;

(2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or

(b) The child disobeys the reasonable and lawful directions of his parents or other custodian and is beyond their control; or

(c) The child is habitually absent from his home without sufficient cause, permission, or justification; or

(d) The behavior or associations of the child are otherwise injurious to his welfare or to the welfare of others; or

(e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

(4) For the adoption of a person;

(5) For the commitment of a child to the guardianship of the department of social services as provided by law.

2. If the child resides in a county of this state and the proceeding is commenced in a juvenile court of another

county, the juvenile court in the county in which the proceeding is commenced may, on motion of either party or on its own motion made prior to final disposition, transfer the proceeding to the county of the child's residence for further action. The proceeding may also be transferred if the residence of the child changes pending the proceeding. Certified copies of all legal and social documents and records pertaining to the case on file with the clerk of the transferring juvenile court shall accompany the transfer.

3. In any proceeding involving any child taken into custody in a county other than the county of the child's residence, the juvenile court of the county of the child's residence shall be notified of such taking into custody within seventy-two hours.

Section 211.141, RSMo 1982 Supp., provides as follows:

**211.141. Child returned to parent, when, conditions—detention or order of court—detention without order, when.**—1. When a child is taken into custody as provided in section 211.131, the person taking the child into custody shall, unless it has been otherwise ordered by the court, return the child to his parent, guardian or legal custodian on the promise of such person to bring the child to court, if necessary, at a stated time or at such times as the court may direct. The court may also impose other conditions relating to activities of the child. If these additional conditions are not met, the court may order the child detained as provided in section 211.151. If additional conditions are imposed, the child shall be notified that failure to adhere to the conditions may result in the court imposing more restrictive conditions or ordering the detention of the child. If the person taking the child into custody believes it desirable, he may request the parent, guardian or legal custodian to sign a written promise to bring the child into

court and acknowledging any additional conditions imposed on the child.

2. If the child is not released as provided in subsection 1, he may be conditionally released or detained in any place of detention specified in section 211.151 but only on order of the court specifying the reason for the conditional release or the detention. The parent, guardian or legal custodian of the child shall be notified of the terms of the conditional release or the place of detention as soon as possible.

3. The juvenile officer may conditionally release or detain a child for a period not to exceed twenty-four hours if it is impractical to obtain a written order from the court because of the unreasonableness of the hour or the fact that it is a Sunday or holiday. The conditional release shall be as provided in subsection 1 of this section, and the detention shall be as provided in section 211.151. A written record of such conditional release or detention shall be kept and a report in writing filed with the court. In the event that the judge is absent from his circuit, or is unable to act, the approval of another circuit judge of the same or adjoining circuit must be obtained as a condition for continuing the conditional release or detention of a child for more than twenty-four hours.

Rule 111.07, Mo. Rules of Court, 1983 Edition states:

a. When the court is informed that a juvenile has been admitted to a detention facility, it shall examine the reasons therefore without a hearing, and shall either:

(1) order the juvenile released pursuant to Rule 111.02; or

(2) order the continued detention of the juvenile until a detention hearing is held pursuant to Rule 111.07b.

b. The court shall order a hearing to determine whether the juvenile is to be continued in detention or released. If such hearing is not held within three days, excluding Saturdays, Sundays and legal holidays, the juvenile shall be released from detention unless the court for good cause shall have ordered the hearing continued.

c. The detention hearing shall be held within the judicial circuit at a date, time and place convenient to the court.

d. Notice of the date, time and place of a detention hearing, and of the right to counsel, pursuant to Rules 111.05 and 128.06, shall be given to the juvenile and his custodian in person, by telephone, or by such other expeditious method as is available.

Rule 111.08, Mo. Rules of Court, 1983 Edition, states:

a. Prior to a detention hearing the juvenile officer shall file a petition pursuant to Rule 114.01 or a motion for modification of the judgment pursuant to Rule 121.01. The court shall examine the petition to determine whether the facts alleged would subject the juvenile to the jurisdiction of the court. If no petition is so filed, the juvenile shall be released forthwith.

b. At the detention hearing the court shall determine whether the juvenile and his custodian have been informed of the right to counsel pursuant to Rule 111.07d. If not, the court shall so inform the juvenile or his custodian of the right to counsel, and the court may continue the hearing to enable counsel to be obtained if the right to counsel is not waived. The court shall receive testimony and other evidence relevant only to the necessity for detention of the juvenile. Any written reports or social records offered to the court at the detention hearing shall be made available to all parties at or prior to the hearing.

c. In the discretion of the court the detention hearing may be held in the absence of the juvenile's custodian and without the presence of the juvenile in a case in which the court's power to act is based upon neglect of the juvenile or absence of proper care, custody or support. In any case, the court may appoint a guardian ad litem for the juvenile for the purpose of the hearing.

d. At the conclusion of the hearing, the court shall order the juvenile released from detention to his custodian or other suitable person pursuant to Rule 111.02, unless the court finds that detention is required:

(1) to protect the juvenile; or

(2) to protect the person or property of others; or

(3) because the juvenile may flee or be removed from the jurisdiction of the courts; or

(4) because the juvenile has no custodian or suitable adult to provide care and supervision for the juvenile and return the juvenile to the court when required; or

(5) because the juvenile is a fugitive from another jurisdiction and an official of that jurisdiction has required the juvenile be detained pending return to that jurisdiction.

The court may then order the juvenile continued in the detention facility pending further proceedings.

## STATEMENT OF THE CASE

The petitioners in this action are judges and associate circuit judges of the Eleventh Judicial Circuit of the State of Missouri. Respondents before this court include both the plaintiffs below as well as co-defendants of the petitioners. Plaintiffs are three juveniles and a class of juveniles who had been or may be detained by juvenile authorities of the Eleventh Judicial Circuit. The petitioners' co-defendants, who are respondents before this court, include the sheriffs of the counties which comprise the Eleventh Judicial Circuit, the juvenile officer and the deputy juvenile officer of the circuit, and the county court judges of one of the counties comprising the Eleventh Judicial Circuit.

This litigation was commenced by the filing by R.W.T. of a complaint on September 6, 1978. On December 1, 1978, two other juveniles, K.M.R. and T.S.C. were allowed to intervene. The complaint in intervention was substantially the same as the original complaint which sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. There were two claims presented in the complaints. The first addressed conditions of detention for juveniles. The second claim alleged that the plaintiffs were entitled to a probable cause hearing prior to their detention.

Other than the defendants listed above, the plaintiffs had originally named as defendants, the director of the Missouri Department of Public Safety and the director of the Missouri Council on Criminal Justice. These defendants were represented at all stages by the Missouri Attorney General's office. The other defendants, including the judicial defendants, were variously represented by the prosecuting attorneys of the counties of the Eleventh Ju-

dicial Circuit, St. Charles County counselor and private counsel.

Discovery and other pretrial matters proceeded throughout the remainder of 1978 and through 1979. On April 21, 1980, plaintiffs moved for partial summary judgment on the issue of whether plaintiffs were entitled to probable cause determinations prior to their detention. This motion was denied by the District Court on May 6, 1980. Although this cause had earlier been set for trial on May 12, 1980, trial was postponed following discussions among the parties. On May 30, 1980, the conditions claims regarding one of the county jails of the Eleventh Judicial Circuit was dismissed. On June 4, 1980, the director of the Missouri Department of Public Safety and the director of the Missouri Council on Criminal Justice were voluntarily dismissed by plaintiffs under Rule 41(a)(1)(ii), Fed.R. Civ.P. On July 30, 1980, a consent judgment was entered prohibiting incarceration of juveniles in the jails in the two remaining counties of the Eleventh Judicial Circuit. On July 2 and July 8, 1980, the plaintiffs and remaining defendants submitted motions for summary judgment on the probable cause issue. Defendants' motion was denied and the plaintiffs' motion was granted in part in an order entered on October 14, 1980. See Appendix A.

On August 22, 1980, plaintiffs filed a request for attorneys' fees. The defendants remaining in the case filed suggestions in opposition on August 29, 1980, in which it was suggested that the State of Missouri should be responsible for the fees. The Missouri Attorney General although no longer representing a party in the action, filed suggestions in opposition on September 5, 1980. In its order of October 14, 1980, granting partial summary judgment, the District Court stated that a final judgment would be entered following resolution of the question of attorneys'

fees. The issue of attorneys' fees was then referred to a United States Magistrate on March 26, 1981.

On November 7, 1980, the Missouri Attorney General entered a limited appearance on behalf of the petitioners herein, on the probable cause issue and filed a motion to reconsider the order of October 14, 1980. The motion to reconsider was denied on March 26, 1981.

On September 15, 1981, the magistrate's report and recommendation on the question of attorneys' fees was filed. On March 30, 1982, the District Court entered an order in which it directed that one-half of the attorneys' fees be paid by the State of Missouri. See Appendix B. On April 8, 1982, a motion to alter or amend this order was filed by the Missouri Attorney General on behalf of the petitioners. This motion was overruled in an order entered on May 18, 1982. See Appendix C.

On June 15, 1982, the petitioners filed their notice of appeal and a cross-appeal was subsequently filed by the plaintiffs. On July 11, 1983, the United States Court of Appeals for the Eighth Circuit filed its opinion affirming the District Court's order on the probable cause issue as well as the award of attorneys' fees against the State of Missouri. See Appendix D. On the probable cause issue the Eighth Circuit construed the District Court's order to apply to both delinquents charged with criminal offenses as well as juveniles who are "status offenders." The court found no significant difference between the two groups as far as the necessity of a probable cause hearing was concerned.

## ARGUMENT

### I.

Petitioners' first point presents two questions regarding constitutional prerequisites for detention of juveniles pending an adjudicatory hearing before the juvenile court. Missouri Supreme Court Rule 111.07(a), Mo. Rules of Court, 1983 Edition provides that, when the juvenile court is informed that a juvenile has been taken into custody and is being temporarily detained, the court is required to consider the reasons therefor and to either order the juvenile released or to order the continued detention of the juvenile until a detention hearing can be held. Missouri Supreme Court Rule 111.07(b), Mo. Rules of Court, 1983 Edition, requires the court to hold a detention hearing within three days. With regard to the detention hearing Missouri Supreme Court Rule 111.08(d), Mo. Rules of Court, 1983 Edition, provides:

> "At the conclusion of the hearing, the court shall order the juvenile released from detention to his custodian or other suitable person pursuant to Rule 111.02, unless the court finds that detention is required:
>
> (1) to protect the juvenile; or
>
> (2) to protect the person or property of others; or
>
> (3) because the juvenile may flee or be removed from the jurisdiction of the courts; or
>
> (4) because the juvenile has no custodian or suitable adult to provide care and supervision for the juvenile and return the juvenile to the court when required; or
>
> (5) because the juvenile is a fugitive from another jurisdiction and an official of that jurisdiction has required the juvenile be detained pending return to that jurisdiction.

The court may then order the juvenile continued in the detention facility pending further proceedings."

The District Court enjoined the detention of juveniles without a prompt hearing to determine whether there exists probable cause to believe that the juvenile has committed an offense. This order was affirmed by the United States Court of Appeals for the Eighth Circuit. There are two significant aspects of the Eighth Circuit's opinion. First, they construed the District Court's order requiring a determination of probable cause to relate to both delinquents and what the court referred to as "status offenders". The court defined this term as those juveniles who came within the juvenile court's jurisdiction by virtue of the provisions of § 211.031.1(2), RSMo 1982 Supp. Briefly, these are juveniles who are in need of care and treatment because (1) they are repeatedly truant, (2) they are beyond the control of their parents, (3) they are habitually absent from home, (4) their behavior and associations are injurious to their welfare or the welfare of others or (5) they have been charged with commission of a non-criminal offense or an offense only applicable to children. Delinquents, on the other hand, are those juveniles who come within the court's jurisdiction under § 211.031.1(3), RSMo 1982 Supp., by reason of their alleged violation of a state law or municipal ordinance.

The second major aspect of the Eighth Circuit's opinion is that they require the probable cause determination to be made in the context of a juricial hearing. Although the District Court's order had referred to a probable cause hearing, the petitioners had interpreted the order as allowing an *ex parte* determination. This was specifically and summarily rejected by the Eighth Circuit. In note 5 of their opinion the court states:

"Although the judges' counsel stated at oral argument that the District Court approved ***ex parte*** de-

terminations of probable cause, the court order makes clear that hearings are required." Appendix D, p. 9.

Petitioners submit that this Court should grant certiorari to consider both of these holdings. With regard to the Eighth Circuit's holding regarding a hearing, the petitioners objections relate to both classes of juveniles identified by the court. As to the court's holding on the necessity of a probable cause determination, petitioners' objections relate only to that class of juveniles which the court identified as "status offenders". Petitioners do not contest the court's holding that a probable cause determination is constitutionally required for juveniles charged with the commission of an offense that would constitute a crime if committed by an adult.

In holding that a "hearing" on the issue of probable cause is a necessity, the Eighth Circuit has exceeded what this Court has declared to be required by the Constitution. The court below did not delineate what this "hearing" entails but to the extent it requires any hearing at all it is in conflict with prior opinions of this Court.

In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), this Court dealt with the right of a criminal defendant to a probable cause determination, pending his trial, under the Fourth Amendment to the United States Constitution. This Court rejected the argument that the Fourth Amendment required a full-scale adversary hearing on the question of probable cause. In particular, this Court stated:

> "These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard-

> probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." *Id.* at 120.

By equating the requirements of the Fourth Amendment for pre-trial detention with the standards for an arrest, petitioners believe that this Court has indicated that procedures for arrest warrants are all that the Constitution requires. Arrest warrants are traditionally issued *ex parte* and on the basis of affidavits and reliable hearsay. There is no requirement for a "hearing" in order to satisfy the Fourth Amendment. In *Baker* v. *McCollan*, 443 U.S. 137 (1979), this Court reiterated this view in the context of a civil rights action brought pursuant to 42 U.S.C. § 1983.

> "Since an adversary hearing is not required, and since the probable-cause standard for pre-trial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Id.* at 143.

Since this Court has never disapproved warrantless arrests made with probable cause, petitioners fail to see any constitutional significance as to whether the probable cause determination is made before or promptly after the person is taken into custody. In short, petitioners believe that the decisions of this Court clearly establish that all that is constitutionally required for detention of a person pending a hearing, is a determination by a judicial officer, which may be made *ex parte*.

This Court has in certain circumstances required the

application of the constitutional protections enjoyed by adults to juveniles as well. *In Re Gault*, 387 U.S. 1 (1967; *In Re Winship*, 397 U.S. 358 (1970); *Breed* v. *Jones*, 421 U.S. 519 (1975). However, this Court has never required as a matter of constitutional law any more protection in a juvenile proceeding than would be available to an adult in a comparable proceeding. Petitioners submit that by the requirement of any sort of hearing on the issue of probable cause for detention of juveniles, the court below has mandated a requirement clearly in excess of what has been recognized for adults. No rationale has been offered as to why any greater level of protection would be required for juveniles in this instance. Petitioners believe, therefore, the decision of the court below is clearly in conflict with prior opinions of this Court and should be reversed.

On the issue of the necessity of a probable cause determination, petitioners' concern focuses on the class that the Court of Appeals identified as "status offenders". Despite the fact that all of the cases relied upon by the court related to delinquents (App.D. p. 10), the court held "that all juveniles who are detained for committing 'status offenses', as that term is used by the parties in this case, are entitled to probable cause hearings to the same extent as juveniles who are accused of committing criminal acts." Appendix D, p. 11.

Petitioners submit that this reasoning is extremely simplistic. The Court of Appeals cited this Court's opinion in *Breed* v. *Jones*, *supra*, eschewing the "civil" label which had in the past been attached to juvenile proceedings. However, the Eighth Circuit's reading and application of *Breed* was superficial and not the result of the candid appraisal called for by this Court in both *Breed* and *In Re Gault*, *supra*. While this Court, as well as others, have rejected the blanket assertion that juvenile court proceedings are "civil", petitioners submit that a conclusion that all juve-

nile proceedings are criminal goes too far. The law makes distinctions with regard to adults as far as civil and criminal proceedings. One need only compare the procedures for criminal defendants with those for adults in civil commitment proceedings. Likewise, it should be recognized that a juvenile court possesses attributes of both civil and criminal law.

The primary fault of the Eighth Circuit's opinion is that it fails to recognize these two aspects of the juvenile court. The court describes the dispositional phase of the juvenile proceedings as "sentencing". Appendix D, p. 12. In note 7 of its opinion the court defines "status offenders" as juveniles accused of committing any of the "past acts" listed in § 211.031.1(2), RSMo 1982 Supp. Appendix D, p. 12. The court treats a "status offender" as one who stands "accused" and characterizes the basis of juvenile court jurisdiction under § 211.031.1(2) as a "past act", impliedly of a quasi-criminal nature, despite the fact this is simply wrong in four out of the five categories under the section. With the exception of the commission of non-criminal offenses, all other subsections relate to a course of conduct or status rather than a specific act: repeated truancy, beyond the control of his parents, habitual absence from home, or behavior and associations injurious to his welfare or the welfare of others. The preliminary language to the section clearly demonstrates that the basis of the juvenile court's jurisdiction is the fact that the child is "in need of care and treatment" for one of the foregoing reasons. Petitioners submit that this is the juvenile court analog of civil proceedings.

As its rationale for applying the same standard to both classes of juveniles, the Eighth Circuit stated that:

> "It would be anomalous to afford less protection to children who were accused of acts, such as running

away, truancy, and the like, which do not present an immediate threat to society, than to children who are accused of such criminal acts as murder, robbery, and rape." Appendix D, pp. 11-12.

Petitioners submit that the court's reasoning is extremely disingenuous. The reason for detention of juveniles for such reasons as truancy and running away is not a "threat to society" but that detention may be necessary for the juveniles's own welfare. For instance, if the juvenile officer or a police officer observed a juvenile wandering the streets late at night, one may or may not have probable cause to believe that the juvenile was a runaway. On the other hand, the court may have a very sound basis for concluding that the juvenile is without proper care and supervision and, therefore, in need of detention. The Eighth Circuit, however, requires that a juvenile court "may not proceed unless there is probable cause to believe that the child has committed a proscribed act." Appendix D, p. 12. In *In Re Gault, supra,* this Court applied several constitutional protections available to adults to juvenile proceedings as well. However, in note 48, at page 31 of its opinion, the Court issued a cautionary statement, ignored by the court below.

> "The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process."

Perhaps it is the use of the term "offender" which is misleading. Although the parties had used this as a shorthand expression, it was employed only to represent nondelinquent juveniles. When one employs a label such as "status offender" one must always keep in mind what it represents lest the connotations of the label itself become

controlling. If one needs a label in this case, a better one would be juveniles "in need of care and treatment". Whether one uses a label or not, petitioners submit that if the juvenile system is to retain any vitality at all, it must be recognized that a juvenile court can be validly concerned with the welfare of a juvenile and that this may justify actions which are broader than what may be constitutionally permissible in adult criminal proceedings.

Even for adults there are instances when a court's primary concern is for the welfare of the individual, i.e., civil commitment proceedings. Although this Court has held that these suits are subject to the requirements of due process of law, this Court has never incorporated criminal concepts and procedures. This Court has repeatedly emphasized that due process of law is variable depending upon the circumstances in which it is to be applied. Petitioners contend that proceedings for juveniles "in need of care and treatment" should be analyzed in this manner so as to take into account its unique features and purposes.

Petitioners submit that the Missouri Supreme Court Rules comply with an appropriate interpretation of the requirements of due process. The Missouri Rules require that the detention of juveniles for any length of time beyond that committed to the discretion of the juvenile officer, must be based on judicial action. The Rules require the juvenile court to consider the reasons for detention, although the facts may not be presented to the court in precisely the same manner that would be required for adults. Generally, the past practice has been for the juvenile officer to present the facts to the court but not in the form of an affidavit sufficient to comply with warrant requirements for adults. After this initial consideration, the court is required to hold a detention hearing if he had not earlier decided to release the juvenile. The Rules set forth specific

reasons under which a juvenile court *may* appropriately detain a juvenile. When the reason for detention is based upon a "past act", the Rule requires a consideration of the issue of probable cause. For instance, in order to detain a juvenile on the grounds that detention is necessary to protect the person or property of others, a court would first have to have some basis to believe that the juvenile had committed some act which threatened the safety or property of others. However, the Missouri Rules also recognize the need for detention for reasons that are not based upon a "past act" of the juvenile—for his welfare or the lack of a suitable custodian. Petitioners submit that this is entirely appropriate. The concept of probable cause is simply foreign to situations of this sort. In constricting the permissible bases for juvenile detention, the Court of Appeals painted with too broad a brush.

In *Kent* v. *United States,* 383 U.S. 541, 551-552 (1966), this court specifically declined to pass upon a contention that detention of a delinquent without a probable cause determination was unconstitutional. Petitioners are aware that this Court recently noted probable jurisdiction in two cases arising out of *Martin* v. *Strasburg,* 689 F.2d 365 (2nd Cir. 1983), probable jurisdiction noted *sub non Schall* v. *Martin* and *Abrams* v. *Martin,* 51 U.S.L.W. 3756. Both of these cases involve pre-hearing detention of delinquents and at least one appears to raise the issue of the necessity of a probable cause determination. Petitioners believe that this Court should grant certiorari in this case as well, to bring order to the entire field of juvenile detention.

## II.

The District Court below entered its order enjoining, among others, the judges and associate circuit judges of the Eleventh Judicial Circuit of the State of Missouri. The

defendants, including the judges, were enjoined not to detain juveniles without a prompt probable cause hearing. See Appendix A. In a later order the District Court ordered that one-half of the attorneys' fees payable to the plaintiffs should be borne by the State of Missouri, based upon the District Court's characterization of the judges and the juvenile officer of the Eleventh Judicial Circuit as "State Defendants". See Appendix B. The judicial defendants appealed alleging that they were immune not only from the award of attorneys' fees but from the entry of the underlying injunction. The United States Court of Appeals for the Eighth Circuit avoided determination of this issue and yet affirmed the award of the attorneys' fees against the State of Missouri.

First, the Court of Appeals below concluded that even if not immune from prospective relief, the injunctive relief sought against the judges in this case was inappropriate. In this regard the court below relied upon *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982), in which the First Circuit concluded that judges are not proper party defendants in an action under 42 U.S.C. § 1983 which challenges the constitutionality of a state statute. The First Circuit had strongly implied, but did not hold, that in such situations there was an absence of a case or controversy under Article III of the United States Constitution. The Court of Appeals below concluded, as did the First Circuit, that when the attack is upon the constitutionality of a statute, a plaintiff should ordinarily sue "the enforcement official authorized to bring suit under the statute; that individual's institutional obligations require him to defend the statute." 695 F.2d at 21-22.

The case below, however, did not involve an attack upon a state statute or a state regulation. The constitution-

ality of the Rules of the Missouri Supreme Court was strongly implicated. Rather, the plaintiffs attacked what they termed the "practice" of the Eleventh Judicial Circuit of detaining juveniles without a probable cause hearing. The petitioners' "practice", however, was pursuant to Court rule. The District Court in its opinion likewise acknowledged that no state statute and no regulation was being challenged. See Appendix A, p. 4. However, despite the fact that the entire cause of action below was based upon this alleged practice of the *judges*, the Eighth Circuit concluded that:

> "The plaintiff's rights can apparently be fully vindicated by an injunction directed solely to the juvenile officer." Appendix D, p. 16.

The Eighth Circuit then concluded that the injunction was properly issued against the juvenile officer and affirming the District Court's characterization of this official as a state officer, upheld the award of attorneys' fees against the State of Missouri.

First, petitioners believe that the purported reversal of the declaratory and injunctive relief against the judges, while upholding it against the juvenile officer, is a sham. In effect, the injunction still runs against the actions of the judges of the Eleventh Judicial Circuit. The theory of the Eighth Circuit was that the juvenile officer was involved in decisions to detain or release juveniles. Any such involvement of the juvenile officer, however, is extremely limited. Section 211.141.3, RSMo 1982 Supp., provides as follows:

> "The juvenile officer may conditionally release or detain a child for a period not to exceed twenty-four hours if it is impractical to obtain a written order from the court because of the unreasonableness of the hour

> or the fact that it is a Sunday or holiday. . . . In the event that the judge is absent from his circuit, or is unable to act, the approval of another circuit judge of the same or adjoining circuit must be obtained as a condition for continuing the conditional release or detention of a child for more than twenty-four hours."

Although the injunction entered by the District Court requires "prompt" probable cause hearings, petitioners do not believe that this limited detention within the authority of the juvenile officer was challenged by the plaintiffs or found by the court to be unconstitutional. Since any detention of a juvenile after twenty-hours must be by court order, from that point on the juvenile officer has no discretion in the matter and acts strictly pursuant to the orders of the juvenile court. It has often been held that court officials acting pursuant to the commands of the court are absolutely immune from actions for damage. In *Williams* v. *Wood*, 612 F.2d 982 (5th Cir. 1980), the court explained the basis for this doctrine as follows:

> "The rationale is that, in this limited group of functions, the clerk of court acts as the arm of the judge and comes within his absolute immunity." *Id.* 985.

In the State of Missouri, the juvenile officer, like a clerk of the court, is not only appointed by the court but serves at its direction. See § 211.351, RSMo 1978.

The only instance in which the injunction below becomes effective is when an order of the court has been entered. If no detention order has been entered, then the juvenile is automatically released. If an order has been entered and the juvenile officer attempts to carry out that court order, then the injunction requires him to undertake his own review of the sufficiency of the judicial proceedings. The risk run by the juvenile officer is that if he

fails to do so he could be held in contempt of court for violation of the injunction. The petitioners believe that in this sort of situation an official such as the juvenile officer, is acting as the alter ego of the judge just as much as congressional aides were held to be the alter ego of senators or congressmen in *Gravel* v. *United States*, 408 U.S. 606 (1972).

Petitioners would point out that unlike the case involving the Supreme Court of Puerto Rico, this is not a situation in which the juvenile officer has any particular enforcement power under a statute. His only authority to detain a juvenile beyond the period of twenty-four hours arises from the court's order and not from any statutory authority.

The spurious nature of the Eighth Circuit's opinion is demonstrated not only by the source of the juvenile officer's authority and the events which trigger the injunction, but also by the court's own language. The Eighth Circuit stated that ". . . we have no reason to doubt that the *judges will comply* with our holding that the Constitution requires probable-cause hearings." (Emphasis added.) Appendix D, p. 16. The court makes this statement despite its recognition that federal courts are not superior to state courts. Appendix D, p. 15. In fact, state judges are not bound by decisions of lower federal courts because they have no appellate jurisdiction over them. Only this Court has such jurisdiction. The system is one of parallelism, not paramountcy. *United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied* 402 U.S. 983.

In note 11 of its opinion (Appendix D, p. 16) the Eighth Circuit virtually invites the petitioners to seek review by this Court. Assuming failure to do so or an unsuccessful review, the Eighth Circuit presumes "the *State* and its *officials* will accept our decision". (Empha-

sis added.) It would appear that the purported injunction against the juvenile officer is not only against the judiciary but is of statewide scope. This interpretation is reinforced by the Eighth Circuit's suggestion that future relief may be an order "that no state law enforcement officer may detain any juvenile without a probable cause hearing." Appendix D, p. 16.

The practical effect of the Eighth Circuit's opinion is to enjoin the application of Rules of the Missouri Supreme Court. While under this Court's opinion in the Virginia case it may be permissible to enjoin court rules which are administrative in nature, petitioners contend that it is improper to enjoin such rules that are purely judicial in nature and can only be implemented by judicial officers. The subterfuge employed by the Court of Appeals should not be allowed to afford relief which would have been inappropriate if the plaintiffs had sued the Missouri Supreme Court.

Petitioners submit that it is obvious that what is sought to be controlled herein are actions of judicial officers and not the actions of the juvenile officer against whom the injunction purports to run. For these reasons, petitioners believe that they, more than the juvenile officer, are enjoined by the order as affirmed by the Eighth Circuit.

Because the injunction herein clearly seeks to control judicial activities it becomes necessary to consider the question which the Eighth Circuit sought to avoid; whether judicial officers, acting in a judicial capacity, are immune from declaratory and injunctive relief. This Court specifically reserved opinion upon this question in *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719 (1980). Inherent within this question is whether judges are immune from the award of attorneys' fees pursuant to 42 U.S.C. § 1988. Petitioners are aware

that this Court has recently granted certiorari in the case of *Allen* v. *Burke,* 690 F.2d 376 (4th Cir. 1982); *cert. granted sub nom Pulliam* v. *Burke,* 51 U.S.L.W. 3770, on the question of whether judges are immune from such an award of attorneys' fees. The question which the petitioners present in this case includes not only that but what they perceive as the underlying issue of whether judges are immune from prospective relief. Petitioners believe that the question of immunity from any sort of relief is a necessary predicate to any award of attorneys' fees, because if no relief at all is possible against a party on the basis of immunity, then no award of attorneys' fees is possible. In *Supreme Court of Virginia, supra,* this Court examined the activities of the Virginia Supreme Court in a legislative, judicial and executive capacity. Insofar as the Virginia Supreme Court was acting in a legislative capacity in enacting its rules, this Court held it to be totally immune from suit, for damages as well as for injunctive or declaratory relief. If this had been the sole basis for the action against the Virginia Supreme Court, no award of attorneys' fees could have stood. If judicial officers possess this same complete immunity from suit, then no award of attorneys' fees is possible either. In the *Supreme Court of Virginia* case this Court noted that some of the Courts of Appeals had apparently accepted the position that judicial immunity did not extend to declaratory and injunctive relief although this point had never been specifically ruled by this Court. Petitioners believe that there are two difficulties with these cases. First, the cases do not consider the impact of a possible award of attorneys' fees under 42 U.S.C. § 1988 as that award might bear upon the rationale for judicial immunity. Most of the cases noted preceded the adoption of 42 U.S.C. § 1988. Second, the particular circumstances and relief sought in many of these cases renders questionable whether a decision on judicial im-

munity was presented or required. For instance, in *Shipp* v. *Todd*, 568 F.2d 133 (9th Cir. 1978), the plaintiff was seeking *coram nobis* relief from a prior conviction. In *Jacobson* v. *Schaffer*, 441 F.2d 127 (7th Cir. 1971), the plaintiff was seeking habeas corpus type relief after being held on default on bail. Given the type of relief that was being sought in these cases, petitioners do not believe that they are very persuasive authority for the proposition that judicial officers are routinely subject to declaratory and injunctive relief.

In *Heimbach* v. *Village of Lyons*, 597 F.2d 344 (2nd Cir. 1979), and *Timmerman* v. *Brown*, 528 F.2d 811 (4th Cir. 1975), the plaintiffs were apparently seeking injunctions against particular judicial proceedings. In such situation there would really be no need to enjoin the court, since if the claim had any merit at all, the plaintiff in the underlying action could be enjoined from proceeding with the action.

In *Fowler* v. *Alexander*, 478 F.2d 694 (4th Cir. 1973), and *Kelsey* v. *Fitzgerald*, 574 F.2d 443 (8th Cir. 1978), the plaintiffs' claims were based on the unconstitutionality of state statutes. This was precisely the situation which led the First Circuit to conclude that judicial officers were not proper party defendants to begin with. *In re Justices of the Supreme Court of Puerto Rico, supra.* In short, the petitioners believe that the cases which have previously indicated that judicial officers lack immunity from declaratory and injunctive relief are highly questionable because they have arisen in situations where it is not necessary to consider the question because other recognized forms of relief were available (mandamus, habeas corpus, etc.) or the relief sought was more appropriately directed to another party. An injunction is an inappropriate means by which to control judicial activities because of its pro-

spective nature. Given the variety of factual situations which can arise before a judge, it may be impossible to devise an injunction which is comprehensible and yet allows for proper judicial discretion. The traditional remedies of mandamus, prohibition, etc. do not suffer from this defect. They are employed in specific factual contexts. Petitioners do not believe that the question of whether judicial officers should be immune from declaratory and injunctive relief has ever received the in depth analysis that it deserves.

In *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, (1975), this Court identified the purposes of legislative immunity under the speech and debate clause of the United States Constitution:

> "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.
>
> " 'The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of the Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.' United States v. Brewster, supra, at 507, 33 L.Ed.2d 507, 92 S.Ct. 2531." 421 U.S. at 502.

Petitioners believe that the policy underlying judicial immunity is no less the protection of the independence and integrity of the judicial process. The petitioners submit that the purpose of the doctrine of judicial immunity is to create an environment in which possible motivations of a judicial officer are reduced to an absolute minimum and that his decisions are based solely upon facts and legal issues before him. His decisions should be made as completely unfettered by outside considerations as is possible. *Stump* v. *Sparkman*, 435 U.S. 349 (1978). Petitioners be-

lieve that this policy would be completely undermined by the possibility of awards of attorneys' fees against judges. This presents the same monetary threat as damage actions. Even the threat of equitable relief presents economic concerns in the form of cost of defense of a lawsuit, quite apart from post judgment concerns as contempt citations.

This court in *Eastland* noted that any civil action, whether for equitable or legal relief, was a distraction and forced legislators to divert their time and energy from their legislative tasks. Requiring judicial officials to even defend such an action similarly impacts upon their judicial activities. Judges would have to confer with attorneys, be deposed and answer interrogatories. This diversion of judicial efforts cannot be justified.

Even in situations such as that presented here, where the injunction purports to operate against court personnel and the award of attorneys' fees runs against another governmental entity, such as the State of Missouri, petitioners believe that extraneous factors intrude upon judicial independence. Only the most irresponsible of judges would not be cognizant of the fact that another official might be subject to a contempt citation or a governmental entity might be subject to an award of attorneys fees based upon his actions. Petitioners do not believe that the question of judicial immunity can be so easily skirted by simply bringing in other governmental officials or agencies when the very activities which are sought to be controlled are those of judicial officers. Petitioners submit, therefore, that they are immune from actions for declaratory and injunctive relief and the concomitant award of attorneys' fees and that the order afffirmed by the Eighth Circuit is, as a practical matter, violative of that immunity and must be reversed.

III.

The District Court allocated the award of attorneys' fees such that the State of Missouri would be liable for one-half while the three counties of the Eleventh Judicial Circuit would split the remaining amount due. Petitioners requested that the District Court reconsider this allocation of the fee believing that the great bulk of time claimed by plaintiffs' counsel was devoted to the issue regarding conditions of juvenile detention rather than to the probable cause hearing issue. At the very least, there was no showing that plaintiffs' counsel had devoted one-half of their time in this case to the issue of the necessity of a probable cause hearing. The District Court rejected this argument in the following language:

> "Finally, the State defendants argue that the proportion of fees awarded against them is not congruent with the proportion of plaintiffs' attorneys' time which was devoted to the issue in which the State defendants had an interest. That is, the State defendants argue that the bulk of plaintiffs' attorneys' time was spent on the issue of jail conditions, and because the counties responsible for maintaining their own juvenile detention centers, the bulk of the award should have been assessed against the counties.
>
> "The Court does not have the same degree of certainty as the State defendants that plaintiffs' attorneys spent more time on the jail conditions issue than on the probable cause issue. Even assuming that such is the case, however, the Court does not consider it unjust to require the State to bear one-half of the award, since the plaintiffs have in effect prevailed against the State on one of the two issues in this case. There is no doubt that the probable cause issue was, in terms

of impact, as important as the jail conditions issue." Appendix C, p. 3.

This holding was affirmed by the Eighth Circuit as follows:

"There were two major issues in this case, jail conditions and probable-cause hearings. The District Court held, correctly, that the state was responsible for its officials' policy on probable-cause hearings, and it therefore it required the state to pay half of the award on fees, imposing the other half on counties, which are responsible for jail conditions." Appendix D, pp. 17-18.

Petitioners believe that this result is inconsistent with this court's opinion in *Hensley* v. *Eckerhardt*, ____ U.S. ____, 76 L.Ed.2d 40 (1983). In that case this court dealt with a situation in which plaintiffs prevailed on some claims but did not prevail on others. In some of these situations, the claims will be distinct and unrelated. With regard to such distinct claims, the court stated as follows:

"In some cases the plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants—often an institution and its officers, as in this case—counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' (Citation omitted.) The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 51.

If distinct and separate claims are brought against the same defendants, and if plaintiff prevails on both, then allocation of an award of attorneys' fees will not be relevant. However, when these distinct and separate claims are brought against separate defendants in the same action, then the manner of allocation becomes significant. Petitioners do not believe that hours expended by plaintiffs' counsel on the jail conditions issue can be said to have been reasonably expended in pursuit of the result reached on the probable cause issue. Petitioners believe that what was required of the court below was to treat these separate claims as if they had been brought in separate actions as this court indicated in *Hensley*. Certainly there was no reason why these claims had to be brought in the same action. If they had in fact been brought in separate actions, the court could obviously not have shifted fees properly allocated to one action to another. The District Court's order, however, has precisely this effect.

The courts below made no attempt to assess in any way or to require the plaintiffs to produce evidence as to the amount of time spent by them on each issue. Instead, they relied solely upon their ad hoc determination as to the significance of the two issues. Defendants believe that this is completely inappropriate. The significance of an issue may have some relevance with regard to whether the plaintiffs may be considered prevailing parties. However, as this court noted in *Hensley*, this only brings a plaintiff across the statutory threshhold and it remains for a District Court to determine what fee is reasonable. This court's opinion in *Hensley* indicates that the question of reasonableness is a function of time spent in relation to success on an issue.

> "That plaintiff is a 'prevailing party' therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Id.* at 52.

In the instant case, there was no finding on what amount of time plaintiffs' counsel expended on the probable cause issue, much less whether or not that amount of time was reasonable. Petitioners submit, therefore, that the District Court's allocation of the award of attorneys' fees was in direct contravention of an opinion of this court and must be reversed.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

# UNITED STATES DISTRICT COURT
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | |
|---|---|
| R.W.T., et al.,<br>*Plaintiffs,*<br><br>v.<br><br>HONORABLE DONALD E. DALTON, et al.,<br>*Defendants.* | No. 78-930 C (3) |

ORDER

This matter is before the Court on the parties' cross-motions for partial summary judgment.

After careful consideration of the matter, and in accordance with the Memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment be and is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment be and is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment on the claims, as set forth in their amended complaint and amended complaint in intervention, that the practice of incarceration of juveniles for alleged violations of the law in the absence of a prompt hearing to determine probable cause is viola-

tive of the rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER DECLARED that the practice in the Eleventh Judicial Circuit of Missouri of detaining juveniles who have been taken into custody for alleged violations of the law in the absence of a prompt hearing before a neutral and detached judicial officer for the purpose of finding probable cause, i.e., of facts and circumstances sufficient to warrant a prudent man in believing that the juvenile had committed or was committing an offense, is violative of the Fourth and Fourteenth Amendments to the Constitution of the United States.

IT IS FURTHER ORDERED that defendants be and are ENJOINED from detaining a juvenile without a prompt probable cause hearing as set forth in this Order.

IT IS FURTHER ORDERED that plaintiffs' prayer, insofar as it requests that the Court order that adversary procedures be employed in the probable cause hearing in question, be and is DENIED without prejudice.

IT IS FURTHER ORDERED that the plaintiffs shall file an appropriate motion and affidavits on the issue of attorneys' fees within 10 days from the date of this Order and defendants shall have 10 days from the receipt thereof to respond.

Dated this 14th day of October, 1980.

Edward L. Filippine

UNITED STATES DISTRICT JUDGE

# UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF MISSOURI
## EASTERN DIVISION

R.W.T., et al.,
*Plaintiffs,*

v.

HONORABLE DONALD E. DALTON, et al.,
*Defendants.*

No. 78-930 C (3)

MEMORANDUM

This matter is before the Court on the parties' cross-motions for partial summary judgment. Both motions request judgment as to the matters set forth in plaintiffs' amended complaint and amended complaint in intervention in which they claim that the practice of the defendants within the Eleventh Judicial Circuit of Missouri of incarcerating juveniles without a probable cause hearing before a detached and neutral judicial officer as to the occurrence of the alleged offense is violative of their constitutional rights.

Plaintiffs argue specifically that the practice violates the constitutional prohibition against unreasonable seizure of the person found in the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiffs also argue that the practice violates procedural due process and the equal protection clause of the Fourteenth Amendment. Because the Court considers the matter to be prop-

erly resolved under the Fourth Amendment as applied to the states via the Fourteenth Amendment, we do not discuss due process and equal protection.

*The Court notes also that the plaintiffs do not challenge any existing Missouri statute or Supreme Court Rule that pertains to juveniles. Rather, they challenge the practice of incarcerating juveniles in the absence of the probable cause hearing noted above.*

A brief summary of the facts shows that there is no dispute as to material facts. Fed.R.Civ.P. 56. Basically, the pleadings of the parties, including the affidavits submitted in support thereof, show that the named plaintiffs in the amended complaint and amended complaint in intervention were incarcerated without being given a probable cause hearing as before a neutral and detached judicial officer. Defendants submit that they do make a probable cause determination on their own prior to or shortly after incarceration, however, *a review of the facts as submitted shows that this is mainly the product of the juvenile court judge's reliance on the representation of the juvenile officer. As such, even though a reasonable determination as to probable cause is made in some cases, no hearing is held before a neutral and detached judicial officer.*

We note at the outset that the Supreme Court has mandated that adults receive timely probably cause hearings before a neutral and detached judicial officer as to the alleged illegal act for which they are to be deprived of liberty. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Also, we note that the argument that a prosecutor's decision to instigate charges via an information was sufficient to justify detention prior to trial was rejected by the Supreme Court in *Gerstein*. *Id.* at 117.

Another preliminary issue involves the question of mootness. The Court has been informed by the attorneys

and some of the defendants that the named plaintiffs are no longer being held within the Eleventh Judicial Circuit. The matter was declared to be a class action, however, *See* this Court's order of December 29, 1978. Also, because of the temporary nature of the detention involved, the situation is one that is "capable of repetition, yet evading review." *See Gerstein* v. *Pugh, supra* at 110-111, n.11; cf. *Sosna* v. *Iowa,* 419 U.S. 393 (1975). Accordingly, this Court holds that the issue before it does not involve a moot claim.

The main argument of defendants in support of their motion and against the plaintiffs' motion is that this Court simply should not extend constitutional rights into state juvenile court procedures. The argument is presumably based on the position that state juvenile court matters, which are not called "criminal" at any point in The Missouri Juvenile Code, R.S.Mo. 211.011 *et seq.,* should not be held to constitutional standards that pertain to the rights of criminal defendants.

The United States Supreme Court has, in relatively recent times (the first juvenile court in the nation was founded in Cook County, Illinois in 1899), soundly rejected the argument that juvenile court matters are strictly civil in nature. *See, e.g., Breed* v. *Jones,* 421 U.S. 519 (1975); *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971); *In re Winship,* 379 U.S. 365 (1970); *In re Gault,* 387 U.S. 1 (1967); *Kent* v. *United States,* 388 U.S. 541 (1966).

In *Kent* the Court dealt with the procedures used to certify a juvenile to stand trial as an adult. The Court noted that the juvenile court system throughout the nation was designed to deal with juvenile offenders in a treatment oriented, humane manner designed to rehabilitate rather than to punish. The Court went on to say, however, that the admonition to juvenile courts to function in a "parental" way was not an invitation to procedural arbitrariness.

*Kent* v. *United States, supra* at 555. In ordering on non-constitutional grounds, *Id.* at 551-552, 556, that certain procedural safeguards be accorded juveniles who were being certified to stand trial as adults the Court was aware that

> [t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. *Id.* at 556.

The following year, in *In re Gault, supra,* the Court dealt with the adjudicative stage of juvenile court proceedings and held several due process protections formerly applicable only to adult criminal proceedings to apply in juvenile court. In doing so the Court again rejected the civil/criminal labels and noted that the main issue was the deprivation of liberty involved in juvenile courts, and not the "civil" label. *Id.* at 27-28. The Court said " . . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13. Soon thereafter the Court held that the "beyond a reasonable doubt" standard of proof was constitutionally required in juvenile court adjudications, again rejecting "the 'civil' label of convenience which had been attached to juvenile proceedings." *In re Winship, supra* at 365, citing to *In re Gault, supra* at 50-51. And although the Court declined to require an absolute right to jury trials in juvenile courts in *McKeiver* v. *Pennsylvania, supra,* on the basis that fundamental fairness did not require it, the Court still rejected the civil/criminal distinctions. *Id.* at 541. The Court's reason for denying the right was that

> [i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality,

and the clamor of the adversary system and, possibly, the public trial. *Id.* at 550.

More recently, the Fifth Amendment protection against double jeopardy was held to apply when a juvenile had been adjudicated as a delinquent in juvenile court based on acts constituting criminal violations, and was then certified to stand trial as an adult for the same transgressions. *Breed* v. *Jones, supra.* Speaking for a unanimous Supreme Court, Chief Justice Burger analyzed the problem as follows:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. *In re Gault,* 387 U.S. 1 (1967); *In re Winship,* 397 U.S. 358 (1970). In so doing this Court has evinced awareness of the threat which such a process represents to the efforts of the juvenile-court system, functioning in a unique manner, to ameliorate the harshness of criminal justice when applied to youthful offenders. That the system has fallen short of the high expectations of its sponsors in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny.
>
> We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose

> object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew "the 'civil' label-of-convenience which has been attached to juvenile proceedings," *In re Gault, supra,* at 50, and that "the juvenile process . . . be candidly appraised." 387 U.S., at 21. See *In re Winship, supra,* at 365-366. [Footnote omitted.] *Breed* v. *Jones, supra* at 528-529.

In view of the foregoing, therefore, the Court rejects the argument of defendants that constitutional safeguards should not be extended to areas involving juvenile courts.

Several federal courts have, on various grounds, called for probable cause hearings for juveniles who are to be held prior to adjudication. *See, e.g., Cox* v. *Turley,* 506 F.2d 1347 (6th Cir. 1974) (holding the absence of, *inter alia,* a probable cause determination when a juvenile was incarcerated for five days in an adult jail to be a violation of the Eighth Amendment ban on cruel and unusual punishment); and Piersma, *et al., Law and Tactics in Juvenile Cases* 3d Ed., §8.4 (1977) and cases cited therein. We note also that no federal court had specifically denied juveniles such a right.

Since the decision of the Supreme Court in *Gerstein* v. *Pugh, supra,* which called for probable cause hearings for adults based on the Fourth Amendment ban against unreasonable seizures of the person, the only federal court of appeals to deal with such a matter in regard to juveniles has held the right to be applicable in juvenile courts. *Moss* v. *Weaver,* 525 F.2d 1258 (5th Cir. 1976). Defendants ad-

mit that the situation is squarely against them, but ask that this Court not follow *Moss,* particularly in light of the fact that Missouri juvenile courts already hold detention hearings pursuant to the Missouri Supreme Court Rules (1980). The detention hearing, however, relates to the need for detention pending adjudication based on factors wholly unrelated to probable cause that the alleged offense has occurred. See, Mo.Sup.Ct. Rules 111.02(b)(2), 111.08. Also, the Court in *Moss* v. *Weaver, supra,* was faced with basically the same situation under Florida law, *Id.* at 1259, and held that such a determination was, while satisfactory in and of itself, not sufficient as a hearing on the issue of probable cause before a neutral and detached judicial officer. *Id.*

In *Moss* v. *Weaver, supra,* the Fifth Circuit surveyed several of the Supreme Court opinions noted herein and concluded that it was required to extend the holding of *Gerstein* v. *Pugh,* to juvenile courts. Specifically, the Court held as follows:

> Upon examining the judgment below in light of *Gerstein* v. *Pugh,* our proper course is clear. First, we affirm the District Court's opinion insofar as it discerned a Fourth Amendment violation in Florida's current juvenile justice system. A finding of probable cause—i.e., of "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense,' " *Gerstein, supra,* 420 U.S. at 111, 95 S.Ct. at 862, 43 L.Ed.2d at 64—is central to the Amendment's protections against official abuse of power. Pretrial detention is an onerous experience, especially for juveniles, and the Constitution is affronted when this burden is imposed without adequate assurance that the accused has in fact committed the alleged crime. [citation omitted]

> This case presents none of the circumstances *Gerstein* described as temporarily suspending the Amendment's command. 420 U.S. at 113-14, 95 S.Ct. at 862-863, 43 L.Ed.2d at 65. *Moss* v. *Weaver, supra* at 1260.

We now hold the same. Accordingly, partial summary judgment will be entered for plaintiffs and defendants' motion will be denied.

In their pleadings plaintiffs make a vigorous argument that this Court should order that the probable cause hearings for juveniles should be conducted in an adversary setting with such trial type features as cross-examination of witnesses and appointment of counsel. Both the Supreme Court in *Gerstein* v. *Pugh, supra,* and the Fifth Circuit in *Moss* v. *Weaver, supra,* have refused to go that far. In *Moss,* the Court set out quite succinctly its reasoning for not granting the trial type rights at that stage:

> The second point emerging from our reading of *Gerstein* is that the District Court erred in ordering that the finding of probable cause must be made on "competent, sworn testimony," with witnesses subject to cross-examination. Such requirements cannot be founded on the Fourteenth Amendment, for, as already noted, the Supreme Court has declined to employ due process analysis on this issue. Nor does the Fourth Amendment itself require adversary safeguards in the probable cause inquiry. As *Gerstein* pointed out, the standard of proof in a probable cause inquiry is low. There is no exacting insistence on certainty, as there is under a reasonable-doubt or even a preponderance standard. Accordingly, there is less need for the assurances of reliability that the adversary system provides. The Court also observed in *Gerstein* that the question of probable cause has for many years been

resolved "in a nonadversary proceeding on hearsay and written testimony," usually in the context of a magistrate's decision whether or not to issue an arrest warrant. And, finally, the Court suggested that pre-trial delay might be exacerbated by a holding that the Fourth Amendment requires adversary hearings in every case of pretrial detention. 420 U.S. at 120-22 & n. 23, 95 S.Ct. at 866-867, 42 L.Ed.2d at 69-70 & n.23.

We know of no unique features of the juvenile courts by which *Gerstein's* reasoning could be distinguished. On the contrary, it is normally assumed that the distinctive advantages of juvenile tribunals derive from their informal nature. We are apprehensive that these advantages, to the extent that they now exist, might be lessened if juvenile proceedings were freighted with the requirements of trial-type procedures. We share the doubts of the four Justices in *McKeiver* who warned against subjecting the juvenile court system to "the traditional delay, the formality, and the clamor of the adversary system," 403 U.S. at 550, 91 S.Ct. 1988, 29 L.Ed.2d at 663 (plurality opinion); *see also id.* at 545, 91 S.Ct. at 1986, 29 L.Ed.2d at 661. *Moss* v. *Weaver, supra* at 1260-1261.

Accordingly, while the Court is in agreement with plaintiffs that probable cause hearings are required prior to adjudication when juveniles are deprived of liberty, the Court does not agree that the additional adversary procedures are required.

As a final matter, the Court notes that all the issues in this case have now been resolved save that of attorneys' fees. The parties shall have ten days from this date to file appropriate motions and affidavits, *see, e.g., Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and opposing parties shall have ten days from re-

ceipt of the motions and affidavits to respond. Final judgment as to the entire case will be entered upon the resolution of the issue of attorneys' fees.

Dated this 14th day of October, 1980.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

**APPENDIX B**

# UNITED STATES DISTRICT COURT
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | |
|---|---|
| R.W.T., et al.,<br>*Plaintiffs,*<br><br>v.<br><br>HONORABLE DONALD E. DALTON, et al.,<br>*Defendants.* | **No. 78-930 C (3)** |

ORDER

This matter is before the Court on the various motions and objections which were referred to United States Magistrate David D. Noce. The Court has reviewed the Magistrate's Report and Recommendation and the objections of the plaintiff and plaintiff-intervenors thereto. The Court is in agreement with the Magistrate's recommendations concerning plaintiffs' bill of costs and the motions for attorney's fees of defendants Koester and Paul; the Magistrate's Report and Recommendation will be adopted in those respects.

However, after careful review of the recommendations of the Magistrate concerning plaintiffs' motion for awards of attorneys' fees, and after review of the motion, as amended September 9, 1980, and at the hearing before the

Magistrate, the Court believes that the fee awards recommended by the Magistrate include compensation for substantial amounts of unnecessarily duplicated time by the four attorneys who represented the plaintiffs. The Court believes that all four counsel were conscientious and well-meaning in engaging in their co-operative efforts, and the Court does not wish to imply any criticism of their conscientiousness. However, the Court cannot allow the defendants to be charged for the combined time of two, three, or four counsel in those areas where a lesser number of hours should have sufficed competently to prepare the case.

After review of the file, the Court will compensate plaintiffs' attorneys, at the rates recommended by the Magistrate, for the following number of hours:

| *Attorney* | *Hours* | *Rate Per Hour* | *Total* |
|---|---|---|---|
| Michael L. Lyons | 240 | $55 | $13,200 |
| Adrienne L. Volenik | 276 | 50 | 13,800 |
| David C. Howard | 123 | 55 | 6,765 |
| David Lambert | 21 | 50 | 1,050 |
| | 660 | | $34,815 |

The plaintiffs have requested that the payment of the fees and costs be apportioned between the defendants, and the Court believes that apportionment is appropriate. After consideration of the matter, the Court finds that an equitable apportionment is as follows: ½ from the State defendants (the judges and the juvenile officer of the Eleventh Judicial Circuit of Missouri, in their official capacities); ¼ from the St. Charles County defendants (the Sheriff and the county administrative court judges, all in their official capacities); and ⅛ each from the Lincoln County and Pike County defendants (the Sheriff of each county in his official capacity).

As noted above, the Court concurs in the Magistrate's recommendation that defendant Gerald Paul be awarded

attorney's fees in the amount of $872.75. Such fees will be awarded against Legal Services of Eastern Missouri, Inc., and the National Center for Youth Law, in proportion to the amount of fees to be paid to each under this order. Legal Services of Eastern Missouri, Inc., and the National Center for Youth Law are to pay their share of the attorney's fees of defendant Paul at such time as they have received all of their attorneys fees from the defendants.

The Court declines to award interest on the award of attorney's fees.

In accordance with the foregoing,

IT IS HEREBY ORDERED that the motion of plaintiff and plaintiff-intervenors to amend their motion for an interim award of attorneys' fees be and is GRANTED.

IT IS FURTHER ORDERED that the motion of plaintiff and plaintiff-intervenors for an interim award of attorneys' fees be and is GRANTED to the following extent, from the defendants in the proportions set out below: Legal Services of Eastern Missouri, Inc., shall be paid the sum of $13,200.00 for the services rendered by Michael L. Lyons; the National Center for Youth Law shall be paid the sum of $21,615.00 for the services rendered by Adrienne L. Volenik, David C. Howard, and David Lambert.

IT IS FURTHER ORDERED that plaintiffs' bill of costs be and is allowed in the sum of $4,162.30..

IT IS FURTHER ORDERED that the sum total of the fees and costs, $38,977.30, shall be borne by the following defendants, in their official capacities only, in the following amounts: $19,488.65 from defendants Donald E. Dalton, Fred Rush, Charles Schroeder, Raymond Grush, David Dalton, William T. Lohmar, Richard K. Zerr,

Kathie Guyton, and Paul Williams; $9,744.33 from defendants Edward Uebinger,[1] Charles Schwendemann, Peggy Coppage, and Donald Boehmer; and $4,872.16 from each of defendants Dave Jenkins and Cliston Hilton.

IT IS FURTHER ORDERED that the motion of defendant Gerald Paul for an award of attorney's fees be and is GRANTED to the extent of $872.75, and that such amount be paid by Legal Services of Eastern Missouri, Inc. and the National Center for Youth Law, in the respective amounts of $330.99 and $541.76, at such time as Legal Services of Eastern Missouri, Inc. and the National Center for Youth Law have received all the attorneys' fees awarded them by this order.

IT IS FURTHER ORDERED that the motion of defendant Koester for an award of attorney's fees be and is DENIED.

Dated this 30th day of March, 1982.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

[1]Plaintiffs inform the Court that Edward Uebinger has replaced Guy L. Koester as Sheriff of St. Charles County.

**APPENDIX C**

# UNITED STATES DISTRICT COURT
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

R.W.T., et al.,
*Plaintiffs,*

v.

HONORABLE DONALD E. DALTON, et al.,
*Defendants.*

**No. 78-930 C (3)**

ORDER

This matter is before the Court on the motion of defendants Honorable Donald Dalton, Honorable David Dalton, Honorable Fred Rush, Honorable Charles Schroeder, Honorable William Lohmar, Honorable Richard Zerr, and Honorable Kathie Guyton (hereinafter referred to as "the State defendants") to alter or amend this Court's order of March 30, 1982, and on the motion of defendant Cliston Hilton to reconsider and amend the same order. This Court's order of March 30, 1982 provided, *inter alia,* that the plaintiff and plaintiff-intervenors were entitled to awards of attorneys' fees and costs totalling $38,977.30, and that the total award was to be borne by the defendants in the following proportions: one-half by the State defendants and a juvenile officer, Raymond Grush; one-fourth by the St. Charles County defendants; and one-eighth by each

of the Lincoln County and Pike County defendants. The awards were made against these defendants in their official capacities only.

The State defendants, through an Assistant Attorney General of the State of Missouri, now make several arguments against that order. As a threshhold matter, they argue that it is difficult to ascertain whether this Court intended the State of Missouri to be liable for the award against the State defendants. As noted above, this Court's order awarded one-half of the fees and costs against the State defendants and the juvenile officer in their official capacities. It is clear that in such circumstances the award may be paid from State funds, even though the State is not a party. *Finney* v. *Hutto,* 437 U.S. 678, 799 (1978). It was and is the intention of this Court that the one-half of the award in question be paid from any State funds available for that purpose, although not from the operating budget of the Eleventh Judicial Circuit.

The State defendants next contend that the title "State defendants" is a misnomer, and that their positions at times involve a mixture of State and county functions. However, there is no dispute that the State pays the salaries of the State defendants and the juvenile officer. While it may be true, as the State argues, that it has no control over these defendants (presumably because the judges of the Eleventh Judicial Circuit are elected, and the juvenile court appoints the juvenile officer, §§478.600 and 211.351, R.S.Mo. 1978), the same could be said of such elected officials as the Governor and Attorney General of the State of Missouri. Yet the State could not contend that it was not responsible for fees awarded against those individuals in their official capacities. Therefore, the Court rejects the State defendants' argument that they are not actually State defendants.

The State defendants also argue that the doctrine of judicial immunity should be held to bar the award against the judges of the Eleventh Judicial Circuit for actions taken in their judicial capacity. While that issue was not presented in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), on remand, 505 F.Supp. 822 (E.D.VA. 1981), the Third Circuit has held that judicial immunity does not bar an award of attorneys' fees against judges under 42 U.S.C. §1988. *Morrison* v. *Ayoob*, 627 F.2d 669 (3rd Cir. 1980), *cert. denied* 449 U.S. 1102 (1981); *cf. Entertainment Concepts, Inc., III* v. *Maciejewski*, 631 F.2d 497 (7th Cir. 1980) *cert. denied*, 450 U.S. 919 (1981) (no immunity from fee award under §1988 against municipal officials with qualified immunity from liability). This Court agrees with the reasoning and the holding in *Morrison*. The doctrine of judicial immunity does not bar the award against the State defendants.

Finally, the State defendants argue that the proportion of fees awarded against them is not congruent with the proportion of plaintiffs' attorneys' time which was devoted to the issue in which the State defendants had an interest. That is, the State defendants argue that the bulk of plaintiffs' attorneys' time was spent on the issue of jail conditions, and because the counties are responsible for maintaining their own juvenile detention centers, the bulk of the award should have been assessed against the counties.

The Court does not have the same degree of certainty as the State defendants that plaintiffs' attorneys spent more time on the jail conditions issue than on the probable cause issue. Even assuming that such is the case, however, the Court does not consider it unjust to require the State to bear one-half of the award, since the plaintiffs have in effect prevailed against the State on one of the two issues

in this case. There is no doubt that the probable cause issue was, in terms of impact, as important as the jail conditions issue.

Accordingly, the Court will deny the motion of the State defendants for reconsideration.

Defendant Hilton's motion raises the argument that plaintiffs have not prevailed against him as sheriff of Lincoln County. Defendant Hilton points out that this Court granted summary judgment on May 30, 1980, on the issue of the conditions of confinement in the Lincoln County Jail, because it was clear that under the directives of the Eleventh Judicial Circuit, no juveniles could be detained in the Lincoln County Jail.

The Magistrate recommended, on two bases, that defendant Hilton be among those defendants against whom fees were to be awarded: 1) the plaintiffs prevailed against defendant Hilton on the probable cause determination issue, because the judicial activities in the entire Eleventh Judicial Circuit were affected by this Court's judgment on that issue; and 2) juveniles taken into custody in Lincoln County could be detained in Pike County, and plaintiffs did obtain relief against the conditions in the Pike County jail in the consent judgment. However, in this Court's view, as noted above, the plaintiffs prevailed against the State defendants, not against the county defendants, on the probable cause issue. Moreover, while juveniles from Lincoln County may be detained in Pike County (or St. Charles County) facilities under the Eleventh Judicial Circuit directive of August 2, 1976 (see this Court's memorandum filed May 30, 1980), that situation exists as a result of the directive of the State defendants, not as the result of any decision by defendant Hilton. Moreover, defendant Hilton did not share the responsibility for maintenance of the St. Charles and Pike County jails.

The Court cannot simply assume that if Lincoln County had had its own juvenile detention facilities, unconstitutional conditions would have prevailed there.

Accordingly, the Court will grant the motion of defendant Hilton to reconsider and amend. The Court will divide the expenses originally awarded against defendant Hilton evenly between the St. Charles County and Pike County defendants, as the juveniles from Lincoln County may be detained in the facilities of both counties. Therefore, the award against each of those defendants will be increased by the sum of $2,436.08.

In accordance with the foregoing,

IT IS HEREBY ORDERED that the motion of defendants Honorable Donald Dalton, Honorable David Dalton, Honorable Fred Rush, Honorable Charles Schroeder, Honorable William Lohmar, Honorable Richard Zerr, and Honorable Kathie Guyton, to alter or amend judgment, be and is DENIED.

IT IS FURTHER ORDERED that the motion of defendant Hilton to reconsider and amend be and is GRANTED, and that that portion of this Court's order of March 30, 1982, assessing $4,872.16 in fees and costs against defendant Hilton be and is rescinded and revoked.[1]

IT IS FURTHER ORDERED that the amount of fees and costs assessed against defendants Uebinger, Schwende-

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[1]Although defendant Hilton's motion also requests that the award against defendant Honorable Kathie Guyton be reconsidered, defendant Guyton is one of the State defendants, and she was not named in the portion of the Court's order which assessed fees and costs against the Lincoln County defendant.

mann, Coppage, and Boehmer, in their official capacities, be and is increased to $12,180.41; and that the amount of fees and costs assessed against defendant Jenkins, in his official capacity, be and is increased to $7,308.24.

Dated this 18th day of May, 1982.

Edward L. Filippine

UNITED STATES DISTRICT JUDGE

## APPENDIX D

# UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT
### Nos. 82-1745 and 82-1793

R.W.T., K.M.R., and T.S.C., minors, by and through their next friends and attorneys, Kenneth A. Cohn, Robert J. Goodwin, Michael L. Lyons, Jeanette Ganousis, David C. Howard, and Adrienne E. Volenik, on their own behalf and on behalf of all others similarly situated,

*Appellees,*

v.

The Honorable Donald E. Dalton; The Honorable David Dalton; The Honorable Fred Rush; The Honorable Charles R. Schroeder; The Honorable William T. Lohmar; The Honorable Richard Zerr; and The Honorable Kathie Guyton,

*Appellants,*

The Honorable Paul Williams; The Honorable Charles Schwendemann; The Honorable Peggy Coppage; The Honorable Donald Boehmer; Guy L. Koester, Sheriff; Cliston Hilton, Sheriff; Dave Jenkins, Sheriff; Raymond J. Grush, Juvenile Officer; and Gerald W. Paul, Deputy Juvenile Officer,

*Appellees.*

No. 82-1745

**On Appeal from the United States District Court for the Eastern District of Missouri.**

R.W.T., K.M.R., and T.S.C., minors, by and through their next friends and attorneys, Kenneth A. Cohn, Robert J. Goodwin, Michael L. Lyons, Jeanette Ganousis, David C. Howard, and Adrienne E. Volenik, on their own behalf and on behalf of all others similarly situated,

*Appellants,*

v.

The Honorable Donald E. Dalton; The Honorable David Dalton; The Honorable Fred Rush; The Honorable Charles R. Schroeder; The Honorable William T. Lohmar; The Honorable Richard Zerr; The Honorable Kathie Guyton; The Honorable Paul Williams; The Honorable Charles Schwendemann; The Honorable Peggy Coppage; The Honorable Donald Boehmer; Guy L. Koester, Sheriff; Cliston Hilton, Sheriff; Dave Jenkins, Sheriff; Raymond J. Grush, Juvenile Officer; and Gerald W. Paul, Deputy Juvenile Officer,

*Appellees.*

No. 82-1793

Submitted: April 12, 1983
Filed: July 11, 1983

Before ARNOLD and BENNETT,* Circuit Judges, and HENLEY, Senior Circuit Judge.

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ARNOLD, Circuit Judge.

In this case a class of juveniles allege that they were denied their constitutional rights when they were detained in Missouri county jails without being afforded probable-cause determinations. Plaintiffs, suing under 42 U.S.C. §1983, claim that to jail a juvenile without a hearing on whether there is probable cause to believe that an act justifying imprisonment has been committed, is an unreasonable seizure of the person in violation of the Fourth and Fourteenth Amendments. The District Court[1] agreed, granted the plaintiffs declaratory and injunctive relief against various county and state officials, and awarded costs and attorneys' fees to the plaintiffs. The judges and associate judges of the Eleventh Judicial Circuit of the State of Missouri appeal, and the plaintiffs cross-appeal. On the merits of the principal questions presented, we agree with the District Court and affirm. We hold that juveniles are entitled to a probable-cause hearing before a neutral and detached magistrate, and that the District Court properly imposed upon the State of Missouri one-half the plaintiffs' attorneys' fees.

I.

The plaintiffs are a class of juveniles who have been, are, or may be detained in jails or detention centers by

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*The Hon. Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by designation.

[1]The Hon. Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

juvenile authorities of the Eleventh Judicial Circuit of the State of Missouri. The Eleventh Judicial Circuit contains St. Charles, Lincoln, and Pike Counties. The defendants include the judges and associate judges of the Eleventh Judicial Circuit; the judges of the County Court for St. Charles County, an administrative body under Missouri law; the sheriffs of St. Charles, Lincoln, and Pike Counties; and the juvenile officer and deputy juvenile officer of the Eleventh Judicial Circuit. The plaintiffs sought declaratory and injunctive relief on two issues. The first issue concerned alleged unconstitutional conditions in the St. Charles, Pike, and Lincoln County jails, in which juveniles were confined. This issue was disposed of by a consent judgment entered July 31, 1980, which prohibited the defendants from incarcerating juveniles in the St. Charles or Pike County jails. The issue of jail conditions is no longer in dispute.

The second issue concerned the defendants' practice of detaining juveniles *without affording them a preliminary hearing before a neutral and detached judicial officer to determine whether there was probable cause to believe that the juveniles had committed the acts with which they were charged.* On October 14, 1980, the District Court granted summary judgment in favor of the plaintiffs on this issue, holding that the defendants' practice violated the plaintiffs' right to be free from unreasonable seizure under the Fourth and Fourteenth Amendments.[2] On March 30, 1982, the District Court entered a final judgment, awarding costs of $4,162.30 and attorneys' fees of $34,815

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[2]The District Court denied the plaintiffs' request that the probable-cause hearing be attended by full adversary safeguards such as appointment of counsel and cross-examination, citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *Moss* v. *Weaver*, 525 F.2d 1258 (5th Cir. 1976). The plaintiffs do not contest this ruling on appeal.

to the plaintiffs. The Court directed the defendants to pay as follows:

> ½ from the State defendants (the judges and the juvenile officer of the Eleventh Judicial Circuit of Missouri, in their official capacities); ¼ from the St. Charles County defendants (the Sheriff and the county administrative court judges, all in their official capacities); and ⅛ each from the Lincoln County and Pike County defendants (the Sheriff of each county in his official capacity).

Designated Record (D.R.) 203.[3] The Court also directed the plaintiffs' attorneys to pay $872.75 for the attorneys' fees of defendant Gerald Paul, a former deputy juvenile officer of the Eleventh Judicial Circuit.

Seven of the judges and associate judges of the Eleventh Judicial Circuit (hereinafter "judges") appeal, contending that (1) juveniles who are detained for "status offenses" are not entitled to probable-cause hearings, (2) the prerequisites for injunctive relief were not met, (3) judges are immune from declaratory and injunctive relief under §1983, and (4) the State of Missouri should not be required to pay one-half of the plaintiffs' attorneys' fees.

The plaintiffs cross-appeal, arguing that the District Court erred in (1) failing to award postjudgment interest on their award of attorneys' fees and costs and (2) awarding attorneys' fees in favor of defendant Gerald Paul against plaintiffs' counsel.

## II.

Under Missouri law, the juvenile court has jurisdiction over both children who are charged with violating the crim-

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[3]The Lincoln County Sheriff was later relieved of liability, and his share was divided between the St. Charles and Pike County defendants. D.R. 218-19.

inal law—delinquents—*and children who are charged with committing noncriminal acts which are considered dangerous to the welfare of the juvenile or others—status offenders.* The jurisdictional statute reads in pertinent part:

> 1. . . . the juvenile court shall have exclusive original jurisdiction in proceedings:
>
> * * * *
>
> (2) Involving any child . . . who is alleged to be in need of care and treatment because:
>
> (a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or
>
> (b) The child disobeys the reasonable and lawful directions of his parents or other custodian and is beyond their control; or
>
> (c) The child is habitually absent from his home without sufficient cause, permission, or justification; or
>
> (d) The behavior or associations of the child are otherwise injurious to his welfare or to the welfare of others; or
>
> (e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children . . . .
>
> (3) Involving any child who is alleged to have violated a state law or municipal ordinance . . . .

**Mo. Ann. Stat. §211.031 (Vernon 1983). It is important to note that each of the five categories listed in paragraph (2) turns on some past act on the part of the juvenile charged.**

Both delinquents and status offenders may be taken into judicial custody by law-enforcement officers or by the juvenile officer. Mo. Sup. Ct. R. 111.01.[4] The juvenile officer has authority to authorize detention of the child for 48 hours. Mo. Sup. Ct. R. 111.06(b). The juvenile can be detained for more than 48 hours only upon a court order to hold the juvenile for a detention hearing. Mo. Sup. Ct. R. 111.06(d). The detention hearing, at which the court determines "whether the juvenile is to be continued in detention or released," must be held within three days, excluding weekends and legal holidays, from the date of the court order. Mo. Sup. Ct. R. 111.07(b). At the hearing, "The court shall receive testimony and other evidence relevant only to the necessity for detention of the juvenile." Mo. Sup. Ct. R. 111.08(b). The court must release the child

> unless the court finds that detention is required:
>
> (1) to protect the juvenile; or
>
> (2) to protect the person or property of others; or
>
> (3) because the juvenile may flee or be removed from the jurisdiction of the courts; or
>
> (4) because the juvenile has no custodian or suitable adult to provide care and supervision for the juvenile and return the juvenile to the court when required; or
>
> (5) because the juvenile is a fugitive from another jurisdiction and an official of that jurisdiction has required the juvenile be detained pending return to that jurisdiction.

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[4]We set forth the procedure prescribed by the current Missouri Supreme Court Rules, which were amended to make detention hearings mandatory after January 1, 1982, over a year after the District Court rendered its decision. The amended rules are no more explicit with regard to the necessity for probable-cause hearings than were the former rules.

Mo. Sup. Ct. R. 111.08(d). As the Comment to the Rule emphasizes, "The detention hearing is to determine only whether a juvenile should be continued in detention, or released to his custodian." *The rule requires no inquiry into whether there is probable cause to believe that the child has committed any particular past act.* Sometime after the detention decision is made, the court holds a hearing on the merits of the charges against the juvenile and makes a disposition of the case. Mo. Sup. Ct. R. 119.01-.07.

The District Court found that although sometimes the juvenile judge made a probable-cause determination before or shortly after the juvenile was incarcerated,

> this is mainly the product of the juvenile court judge's reliance on the representation of the juvenile officer. As such, even though a reasonable determination as to probable cause is made in some cases, no hearing is held before a neutral and detached judicial officer.

D.R. 147. This finding is clearly supported by the record. Judge David A. Dalton, who was currently serving as the juvenile court judge, testified:

> Q. Is there a separate probable cause hearing at all that's held for juveniles?
>
> A. For what purpose?
>
> Q. Simply to determine whether or not there is probable cause to believe that the youth committed the act?
>
> A. No. All the statute requires is that a petition be filed and if the petition is filed, there has been a determination of some probable cause prior to that time.
>
> Q. But is that a judicial determination or just a determination made by your staff?

A. It's by the juvenile officer.

Deposition of Judge Dalton 15-16.

III.

The judges concede that juveniles who are accused of committing acts which violate the criminal law are entitled to probable-cause determinations by a neutral and detached judicial officer. *They argue that status offenders are not entitled to probable-cause determinations, that the relief granted by the District Court did not extend to status offenders, and that the plaintiffs had no standing to bring this suit.*

A.

We agree with the District Court that juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable-cause hearing.[5] In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment requires the State to "provide a fair and reliable determination of probable cause as a condition of any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125. Although *Pugh* involved only the rights of adults to a probable-cause hearing, we believe that the right must be extended to juveniles as well.

In recent years the Supreme Court has recognized that "there is a gap between the originally benign conception of the [juvenile-court] system and its realities," *Breed* v. *Jones*, 421 U.S. 519, 528 (1975), and that juveniles are entitled to the " 'essentials of due process and fair

[5]Although the judges' counsel stated at oral argument that the District Court approved *ex parte* determinations of probable cause, the court's order makes clear that hearings are required. D.R. 144-45.

treatment,' " *In re Gault*, 387 U.S. 1, 30 (1967) (quoting *Kent* v. *United States*, 383 U.S. 541, 562 (1966)). Accordingly, the Court has held that a juvenile court must hold a hearing before it may waive jurisdiction and transfer a juvenile to criminal court, *Kent* v. *United States, supra;* that juveniles subject to delinquency adjudications must be accorded written notice, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses, *In re Gault, supra;* that in delinquency adjudications, the government must prove beyond a reasonable doubt that the juvenile committed the criminal act, *In re Winship*, 397 U.S. 358 (1970); and that double-jeopardy protections apply to juvenile adjudicatory proceedings; *Breed* v. *Jones, supra.* The Court has declined to extend only one procedural right to juvenile offenders—the right to a jury trial. In *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), the Court found that the benefits of a juvenile court's ability to function in a "unique manner" outweighed the fact-finding advantages of a jury trial. *Id.* at 547 (plurality opinion).

That requiring juvenile courts to hold probable-cause hearings will not impinge on their ability to function in a "unique manner" is evidenced by the number of decisions that have recognized that probable-cause hearings are fundamental to juveniles' rights to due process. *E.g., Moss* v. *Weaver*, 525 F.2d 1258 (5th Cir. 1976); *Cox* v. *Turley*, 506 F.2d 1347 (6th Cir. 1974); *Brown* v. *Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971); *Cooley* v. *Stone*, 414 F.2d 1213 (D.C. Cir. 1969) (per curiam); *Osorio* v. *Rios*, 429 F. Supp. 570 (D.P.R. 1976) (three-judge court); *Black Bonnet* v. *South Dakota*, 357 F. Supp. 889 (D.S.D. 1973); *Baldwin* v. *Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971); *Bell* v. *Superior Court*, 117 Ariz. 551, 574 P.2d 39 (Ct. App. 1977); *T.K.* v. *State*, 126 Ga. App. 269, 190 S.E.2d 588 (1972) (by implication); *In*

*re Joshua*, 327 So.2d 429 (La.App. 1976); *People ex rel. Guggenheim* v. *Mucci*, 32 N.Y.2d 307, 298 N.E.2d 109, 344 N.Y.S.2d 944 (1973) (New York law); *In re Edwin R.*, 60 Misc. 2d 355, 303 N.Y.S.2d 406 (Fam. Ct. 1969); *In re Roberts*, 290 Ore. 441, 622 P.2d 1094 (1981) (en banc).[6] Experts in the field also view probable-cause hearings as crucial to procedural fairness. *E.g.*, Juvenile Justice Standards Project, Institute of Judicial Administration-American Bar Association, *Standards Relating to Interim Status* §7.6F, *Standards Relating to Pretrial Court Proceedings* §§4.1, 4.2 (1980); Paulsen & Whitebread, *Juvenile Law and Procedure* 120 (1974). The right not to be jailed for any substantial period of time without a neutral decision that there is probable cause is basic to a free society. Children should enjoy this right to less than adults.

B.

Nevertheless, the state argues that juveniles who are detained for committing acts which, if they were adults, would not be criminal are not entitled to probable-cause hearings. Juvenile-court adjudications of status offenses are claimed to be essentially civil, not criminal.

*We hold that juveniles who are detained for committing "status offenses," as that term is used by the parties in this case, are entitled to probable-cause hearings to the same extent as juveniles who are accused of committing criminal acts.*

> [D]etermining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew "the 'civil' label-of-convenience which has been attached to juvenile proceedings," *In re Gault, supra,*

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[6] This Court has not previously decided the question. See *United States* v. *Allen*, 574 F.2d 435 (8th Cir. 1978).

at 50, and that "the juvenile process . . . be candidly appraised." 387 U.S., at 21.

*Breed* v. *Jones, supra,* 421 U.S. at 529. It would be anomalous to afford less protection to children who are accused of acts, such as running away, truancy, and the like, which do not present an immediate threat to society, than to children who are accused of such criminal acts as murder, robbery, and rape.[7] In either case, the juvenile court may not proceed unless there is probable cause to believe that the child has committed a proscribed act. As a practical matter, both classes of juveniles are subject to the same pre-trial deprivation of liberty: both accused delinquents and accused status offenders may be put in jail pending a judicial hearing on the merits of their cases. In fact, under Missouri law, status offenders are treated the same as delinquents except for certain restrictions on "sentencing."[8]

C.

The state goes on, however, to argue that the District Court ordered probable-cause hearings to be held only for accused delinquents, not for accused status offenders, and that since none of the named plaintiffs was detained for a delinquent act, none has standing to "seek relief on behalf of himself or any other member of the class," *O'Shea* v.

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[7]For purposes of this appeal, the category "status offenders" means juveniles accused of any of the specific past acts listed in Mo. Ann. Stat. §211.031.1(2) (Vernon 1983), quoted *ante* at 6. Missouri juvenile courts also have jurisdiction over juveniles alleged to be in need of care and treatment because their parents are neglecting them, or because they are otherwise without proper care, custody, or support. Mo. Ann. Stat. §211.031.1(1) (Vernon 1983). This last-described class of juveniles is not involved in this case.

[8]For example, status offenders cannot be committed to the Division of Youth Services for a first offense. Mo. Ann. Stat. §211.181.2(2)(a) (Vernon 1983).

*Littleton*, 414 U.S. 488, 494 (1974) (footnote and citations omitted).

Initially, we observe that the question of standing depends on the nature of the relief sought, not on the nature of the relief granted. It is clear from the record that the plaintiffs sought probable-cause determinations for all juveniles, without regard to the reasons for their detention. Prior to the entry of the District Court's order and memorandum, the state never argued that status offenders should be treated differently from juveniles charged with violations of the criminal law. Rather, it argued "that if there is a constitutional right to a probable cause determination by a judicial officer *whenever a juvenile is detained* by an arm of the State of Missouri, the current state statutes, court rules, and juvenile court practices meet all the requirements of such a probable cause determination." D.R. 93 (emphasis added). Since the issue as framed by the parties concerned the rights of all juvenile detainees, we believe that the District Court's order has a similar scope. We see nothing improper in this. As we have noted, the distinction between status offenders and juveniles accused of crime is insignificant in terms of the requirement that a probable-cause determination be made. The District Court certified plaintiffs as proper representatives of a class composed of "all who have been, are now, or may be detained . . . without a determination of probable cause . . . ." D.R. 6. Defendants do not complain on appeal about this certification. It is entirely proper for the named class representatives, whether they themselves are status offenders or not, to seek and obtain relief for the entire class.

## IV.

The parties devote much of their argument to the question whether judges acting in their judicial capacity

are immune from declaratory and injunctive relief under 42 U.S.C. §1983. Neither the Supreme Court nor this Court has decided the question. *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 735 (1980); *e.g.*, *Bonner* v. *Circuit Court of the City of St. Louis, Missouri*, 526 F.2d 1331, 1334 (8th Cir. 1975) (en banc), *cert. denied*, 424 U.S. 946 (1976).[9] Nor are we required to decide the issue now, because even if judges are not immune from prospective relief with respect to their judicial acts, we believe that such relief is inappropriate in this case.

A.

In *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982), Judge Breyer cogently demonstrated that in most §1983 cases, federal courts should refuse to grant relief against state judges. In the typical prospective assault on the constitutionality of a state statute, the state judge is not a proper party defendant under §1983 because he has no stake in upholding the statute: he is not the plaintiff's adversary, and the complaint should be dismissed for failure to state a claim upon which relief can be granted.[10] 695 F.2d at 22.

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[9]Although this Court at one time seems to have taken contradictory positions on the issue, *compare Koen* v. *Long*, 428 F.2d 876 (8th Cir. 1970), *aff'g per curiam* 302 F. Supp. 1383, 1389 (E.D. Mo. 1969), *cert. denied*, 401 U.S. 923 (1971) (indicating no immunity), *with Smallwood* v. *United States*, 486 F.2d 1407 (8th Cir. 1973), *aff'g without opinion*, 358 F. Supp. 398, 403 (E.D. Mo. 1973) (*contra*), *and Tate* v. *Arnold*, 223 F.2d 782, 786 (8th Cir. 1955) (same), we declared in *Bonner* that "[t]his circuit has never decided whether those enjoying judicial immunity from damage suits are similarly immune from suits seeking equitable and injunctive relief." 526 F.2d at 1334. *Accord*, *Birch* v. *Mazander*, 678 F.2d 754, 756 (8th Cir. 1982).

[10]We expressly refrain, as did the court in *In re Justices*, from deciding that there is no "case or controversy" under Article III in this situation.

> Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. They are sworn to uphold the Constitution of the United States. They will consider and decide a claim that a state or Commonwealth statute violates the federal Constitution without any interest beyond the merits of the case.

*Id.* at 21. In this sort of case, the plaintiff ordinarily should sue "the enforcement official authorized to bring suit under the statute; that individual's institutional obligations require him to defend the statute." *Id.* at 21-22.

Although the plaintiffs here characterize their attack as one upon the court's "practice" rather than upon the constitutionality of the Missouri statutes or Supreme Court Rules, this distinction makes no difference to our analysis. The judges of the Eleventh Judicial Circuit, in the course of deciding juvenile cases, are interpreting Missouri law and the United States Constitution as requiring no probable-cause hearings for detained juveniles. The fact that we disagree with them does not make their determination any less an act of disinterested adjudication. Their position is no more adverse to that of the plaintiffs than the position of any judge who rules adversely on a point of law to any litigant. Thus, the judges were not proper defendants in this suit.

The First Circuit identified a second ground for a federal court to refrain from granting relief under §1983 against state judges, one founded on comity. The point has been made elsewhere:

> Federal courts (except for the Supreme Court) are not superior to state courts, or higher in any theoretical order of precedence. Federal law is supreme and, if valid, supersedes state law no matter what court de-

> clares it. Federal law declared by a state court, for example, is supreme over state law declared by a federal court. It is not the forum that counts, but the law-making authority.

Arnold, *State Power to Enjoin Federal Court Proceedings*, 51 Va. L. Rev. 59, 71 (1965).

Making state judges defendants in a federal court unnecessarily undermines this cornerstone of our federal system. Accordingly, "[A] court should not enjoin judges from applying statutes when complete relief can be afforded by enjoining all other parties with the authority to seek relief under the statute." *In re Justices*, 695 F.2d at 23. *Accord, Lamb Enterprises, Inc.* v. *Kirchoff*, 549 F.2d 1052, 1060 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) ("It was a violation of fundamental principles of State-federal relations for a federal judge to enjoin two State judges and their court personnel, when an injunction against the litigant would have accomplished the same purpose."); *Pollard* v. *Roberts*, 283 F. Supp. 248, 260 (E.D. Ark. 1968) (three-judge court) (Henley, J., joined by Blackmun and Harris, JJ.).

Here, the plaintiffs' rights can apparently be fully vindicated by an injunction directed solely to the juvenile officer. Under the Rules of the Missouri Supreme Court, the juvenile officer is involved in decisions to detain or release juveniles. Even if there are cases in which the juvenile judge makes such a decision independently, we have no reason to doubt that the judges will comply with our holding that the Constitution requires probable-cause hearings.[11] "Indeed, it is ordinarily presumed that judges

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[11]The State is free, of course, to seek review of our holding in the Supreme Court of the United States. If it does not do so, or if review is sought and denied, or if review is granted and our judgment affirmed, we assume that the State and its officials will accept our decision.

will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices,* 695 F.2d at 23. Thus, we reverse the District Court's grant of declaratory and injunctive relief against the state judges. If for some reason it turns out that juveniles continue to be held without probable-cause hearings, plaintiffs may apply to the District Court for further relief—an order, for example, that no state law-enforcement officer may detain any juvenile without a probable-cause hearing.

B.

We reject the state's argument that the juvenile officer is immune from declaratory and injunctive relief. Although the juvenile officer may have limited immunity from liability for damages, see, *e.g., Atcherson* v. *Siebenmann,* 605 F.2d 1058, 1064 (8th Cir. 1979), there is no reason to extend that immunity to liability for equitable relief. *Cf. Supreme Court of Virginia* v. *Consumers Union, supra,* 446 U.S. at 736-37 (holding that prosecutors and law-enforcement personnel are subject to suit for equitable relief). Moreover, the juvenile officer did not appeal; thus, he is not contesting the judgment against him.

The state also argues that injunctive relief is improper because the plaintiff class is not suffering irreparable injury. Juveniles detained without probable-cause hearings can get relief, we are told, either on habeas corpus or on petition for mandamus in a state appellate court. The difficulty (among others) with this argument is that both mandamus and habeas corpus come too late: a juvenile detained without a probable-hearing has *already* suffered irreparable injury. Complete relief must include an injunction forbidding all such unlawful detention in the future. The remedy of mandamus, moreover, would in any event lie only against the state judges, not the juvenile officer, and we are not granting an injunction against the judges.

Accordingly, we affirm the District Court's order insofar as it enjoins the juvenile officer from detaining a juvenile without a prompt probable-cause hearing.

V.

We come at last to the order of the District Court holding the State of Missouri liable for one-half of the plaintiffs' attorneys' fees—and the fee question may be the real motivation for this appeal. The state argues that the District Court erred, but we are unpersuaded. There were two major issues in this case, jail conditions and probable-cause hearings. The District Court held, correctly, that the state was responsible for its officials' policy on probable-cause hearings, and it therefore required the state to pay half of the award of fees, imposing the other half on counties, which are responsible for jail conditions. Even though we are now vacating the equitable and declaratory relief granted against the judges, the plaintiffs are still prevailing parties, with respect to the probable-cause issue, against the juvenile officer, and the practice of juvenile officers to detain juveniles without probable-cause hearings is the responsibility of the state, not of any county. As a practical matter, the relief obtained by plaintiffs—a holding that probable-cause hearings are necessary, and an injunction against the juvenile officer—is just as effective as it would be if the relief against the judges were also being affirmed. Our holding that the judges should not have been enjoined, in other words, does not make the result of this case appreciably less favorable to the plaintiffs. We therefore approve the District Court's decision to impose one-half the attorneys' fees on the state. Both the judges and the juvenile officer were sued in their official capacities, and we were informed at the oral argument that the state recognizes its responsibility to pay any award of attor-

neys' fees imposed upon it in this case as a result of its officials' execution of state policies. There is no complaint on appeal that the amount of the fee award was excessive. The defendants were represented by a county prosecutor until after the entry of judgment in the District Court, and the state attorney general's office did not enter the case until that point, but that is not, in our opinion, a special circumstance that would render the award of fees against the state unjust.

VI.

We reverse the District Court on two final issues dealing with atttorneys' fees, both of which are raised by the plaintiffs' cross-appeal. First, the District Court should, in our view, have awarded interest on the plaintiffs' award of fees and costs from March 30, 1972, the date of that award. We agree with the Ninth Circuit's rationale in *Perkins* v. *Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973):

> In our view there exists no real distinction between judgments for attorneys' fees and judgments for other items of damages. . . . [O]nce a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed.

*Id.* at 675. *Accord, Copper Liquor, Inc. v. Adolf Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (per curiam) (interest allowed automatically on attorneys' fees and costs). Any other rule would effectively reduce the judgment for attorneys' fees and costs, because a certain sum of money paid at a certain time in the future is worth less than the same sum of money paid today. Failing to allow awards of attorneys' fees to bear interest would give parties against whom such awards have been entered an artificial and undesirable incentive to appeal or otherwise delay payment.

On remand, the District Court should amend its award to allow interest from and after March 30, 1982, until payment. The interest rate should be determined under 28 U.S.C.A. §1961 (Supp. 1983). This statute became effective on October 1, 1982, after the award of fees was made in this case, but it is the law now, and should be used by the District Court. *Cf., e.g., United States* v. *The Schooner Peggy*, 1 Cranch 103, 110 (1801).

Second, we disagree with the District Court's award of attorneys' fees to the defendant Gerald Paul[12] and against the plaintiffs' counsel. The court made no finding "that the [plaintiffs'] action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). Such a finding is a prerequisite for an award of attorneys' fees against a plaintiff in a civil-rights action.

## VII.

In conclusion, the District Court's declaration that probable-cause hearings are required, both for juveniles accused of criminal acts and for "status offenders" as we have used that term in this opinion, is affirmed, as is its injunction against the juvenile officer in this case. The imposition of one-half of the plaintiffs' attorneys' fees on the State of Missouri is also affirmed. The grant of equitable and declaratory relief against the state judges is reversed, as is the denial of interest on the fee award made to plaintiffs, and the award of fees to defendant

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[12]The parties dismissed the action against Paul in his individual capacity by stipulation, and, by the time the magistrate, to whom the matter of fees had been referred, had prepared his report and recommendation, Paul was no longer a deputy juvenile officer. D.R. 18, 194.

Paul. The cause is remanded with directions to amend the award of fees and costs to provide for the running of interest in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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CLERK

No. 83-591

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

HONORABLE DONALD E. DALTON; HONORABLE DAVID DALTON; HONORABLE FRED RUSH; HONORABLE CHARLES R. SCHROEDER; HONORABLE WILLIAM T. LOHMAR; HONORABLE RICHARD ZERR; and HONORABLE KATHIE GUYTON,

*Petitioners,*

VS.

R.W.T., K.M.R., and T.S.C. and HONORABLE PAUL WILLIAM; HONORABLE CHARLES SCHWENDEMANN; HONORABLE PEGGY COPPAGE; HONORABLE DONALD BOEHMER; GUY L. KOESTER, Sheriff; CLISTON HILTON, Sheriff; DAVE JENKINS, Sheriff; RAYMOND J. GRUSH, Juvenile Officer; and GERALD W. PAUL, Deputy Juvenile Officer,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED BY PETITIONERS FOR REVIEW

1. Are juveniles detained for reasons other than the commission of a criminal offense, entitled to the same level of constitutional protection as juveniles who are charged with the commission of an offense which, if committed by an adult, would constitute a crime?

2. Whether or not the two groups of juveniles identified in question 1 are treated the same for purposes of constitutional analysis, is either group entitled to a "hearing" on the issue of probable cause prior to their continued detention and, if so, what does this hearing entail?

3. Are members of the judiciary, acting in a judicial capacity, immune from entry of declaratory and injunctive relief and the award of attorneys' fees pursuant to 42 U.S.C. §1988?

4. Can a state court employee, consistent with the doctrine of judicial immunity, be enjoined or be the subject of an award of attorneys' fees, when the act enjoined and which forms the basis for the award of attorneys' fees is one performed pursuant to an order of a state court judge?

5. When allocating an award of attorneys' fees under 42 U.S.C. § 1988 among two groups of defendants and on two separate claims, is it permissible to base such allocation upon the relative importance of the two issues, as opposed to the amount of time reasonably expended by counsel for the prevailing party on each issue?

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*Respondents.*

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**On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit**

# RESPONDENTS' BRIEF IN OPPOSITION

## OPINION BELOW

The October 14, 1980 order and memorandum opinion of the district court are unreported but are reprinted in the petition for certiorari at Appendix A. The district court's order of May 18, 1982 is reported: *R.W.T.* v. *Dalton*, 540 F. Supp. 772 (E.D. Mo. 1982). The Eighth Circuit's opinion, styled the same as in the district court, was filed July 11, 1983 and is published at 712 F. 2d 1225.

## STATEMENT OF THE CASE

On September 6, 1978, this action was filed to remedy the practice in the Eleventh Judicial Circuit of the State of Missouri (the counties of Pike, Lincoln and St. Charles) of detaining juveniles in custody without a preliminary probable cause determination by a neutral judicial officer and under allegedly unconstitutional conditions of confinement. The original plaintiff, R.W.T., was a juvenile suing on behalf of himself and the class of juveniles who were or would be detained by juvenile authorities of the Eleventh Judicial Circuit. The defendants included the Circuit judges and Associate Circuit judges of the Eleventh Judicial Circuit, the juvenile officer and deputy juvenile officer of the Circuit, the sheriffs of Pike, Lincoln, and St. Charles Counties, the director of the Missouri Department of Public Safety, the director of the Missouri Counsel on Criminal Justice, and the Administrative County Court judges of St. Charles County.

On December 1, 1978, two additional juveniles, K.M.R. and T.S.C., filed a complaint-in-intervention. The plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The district court certified the case as a class action by order dated December 29, 1978.

On April 21, 1980, plaintiffs filed a motion for partial summary judgment on the issue of whether juveniles were entitled to probable cause determinations prior to detention. This motion was denied by the district court on May 6, 1980.

The case was set for trial on May 12, 1980. On May 13th, the parties reached tentative accord regarding most of the jail conditions issues. Since it had never been used to incarcerate children, partial summary judgment was granted dismissing the Pike County jail from the suit on May 30, 1980. On July 30, 1980, a Consent Judgment was entered which prohibited the incarceration of juveniles in the St. Charles County Jail and Pike County Jail.

On July 2, and July 8, 1980, cross motions for summary judgment were submitted on the issue of whether juveniles were entitled to probable cause determinations prior to extended detention. On October 14, 1980, the district court granted plaintiffs' motion for summary judgment in part and denied defendants' motion for summary judgment. The order stated that a final judgment would be entered following resolution of the question of attorneys' fees, which had previously been requested by plaintiffs.

On November 7, 1980, the Missouri Attorney General entered a limited appearance on behalf of the Circuit Judges and Associate Circuit Judges of the Eleventh Judicial Circuit, and filed a motion to reconsider the order of October 14, 1980 with respect to the probable cause issue. This motion to reconsider was denied on March 26, 1981, at which time the issue of attorneys' fees was referred to United States Magistrate David D. Noce. Magistrate Noce filed his report and recommendation on the attorneys' fees question on September 15, 1981. On March 30, 1982, the district court issued an order awarding attorneys' fees to plaintiffs' counsel and allocating payment responsibility for the award of fees. On April 8, 1982, the Attorney General filed a motion to alter or amend the order of March 30, 1982. This motion was denied by the district court on May 18, 1982.

On June 15, 1982 the circuit judges and associate circuit judges (petitioners herein) filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. A cross-appeal was latter filed by the plaintiffs. On July 11, 1983, the Court of Appeals issued its opinion affirming the district court's ruling that probable cause hearings are required for juveniles prior to extended stays in detention. Although it reversed the district court's grant of equitable relief against the circuit judges and associate circuit judges, it affirmed the district court's injunction against the juvenile officer for the Eleventh Judicial Circuit. The appellate court likewise affirmed the award of attorneys' fees against the state and local defendants. The court also reversed in favor of plaintiffs on two issues raised in their cross-appeal.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I

**The Questions Of Whether Probable Cause Hearings Are Required For Juveniles, Or Whether Probable Cause Determinations Are Required For Status Offenders Are Not Properly Before This Court.**

Petitioners seek certiorari to challenge *inter alia* the Eighth Circuit's affirmance of the district court's decision requiring a prompt, preliminary hearing to determine the existence of probable cause to believe that a suspect child has committed the offense for which he has been charged and detained. This issue, however, was not presented to the Eighth Circuit on appeal. It is raised for the first time here in the petition for certiorari. Indeed, in their Reply/Answer Brief in the Eighth Circuit at 4-5, petitioners themselves dispelled any misconceptions to the contrary:

> Similarly, the brief filed by the plaintiffs indicates a misunderstanding of the precise issues being raised by the judicial defendants. The plaintiffs go through an extended analysis of cases on probable cause all for the purposes of establishing that [district court] Judge Filippine's order was correct as to the law. *At no point in the brief of the judicial defendants was it asserted that the legal conclusion was erroneous.* The issue being raised is not whether juveniles accused of crime are entitled to a probable cause determination but whether the named plaintiffs themselves [status offenders] were entitled to this protection. (Emphasis added.)

Now, petitioners present the question *ab initio* regarding whether hearings are constitutionally required to determine probable cause, without having preserved or developed this question in the lower courts. Ordinarily an appellate court does not give consideration to issues not raised below. *Hormel* v. *Helver-*

*ing*, 312 U.S. 552, 556 (1941). While there may be particular cases or exceptional circumstances which will prompt a reviewing court, where injustice might otherwise result, to consider legal issues which "were neither pressed nor passed upon by the court...below," *Id.* at 557, this is not such a case. Moreover, the instant case does not present special circumstances in which a federal appellate court would be justified in resolving an issue not raised in the court below, as where proper resolution is beyond any doubt. *See Turner* v. *City of Memphis*, 369 U.S. 350 (1962).

Likewise, as the Eighth Circuit noted, the petitioners never argued in the district court "that status offenders should be treated differently from juveniles charged with violations of the criminal law." *R.W.T.* v. *Dalton*, 712 F. 2d 1225, 1232 (8th Cir. 1983), (Appendix D of Petition at A-34). Furthermore, the state never objected to the December 29, 1978 class certification order by the district court finding the status offender respondents to be proper representatives of a class of juveniles composed of "all who have been, are now or may be detained...without a determination of probable cause." *Id.* at 1232. Petitioners neither sought to decertify the plaintiff class in the district court nor claimed error regarding that order in the appellate court. *Id.* at 1232. Respondent juveniles, not being apprised of the existence of this issue until the appeal was taken, had no opportunity to offer relevant evidence on this issue. *See Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

Assuming *arguendo* that the hearing versus *ex parte* determination of probable cause question is properly before this Court, respondents submit (see discussion *infra*) that this issue has long since been resolved. In their Argument at 19, petitioners cite *Martin* v. *Strasberg*, 689 F. 2d 365 (2nd Cir. 1982), *probable jurisdiction noted sub nom. Schall* v. *Martin* and *Abrams* v. *Martin*, 51 U.S.L.W. 3756, intimating that at least one of these cases "kappears to raise the issue of the necessity of a probable cause determination." This is patently incorrect.

Those actions deal with a specific provision of the New York Family Court Act involving preventive detention. The probable cause issue was laid to rest in New York by the passage of the New York Family Court Act, codified at Book 29A, Part I, Judiciary-Court Acts §739 (b) (McKinney 1975, Supp. 1982). This provision was enacted following the litigation in *Guggenheim* v. *Mucci*, 32 N.Y. 2d 307, 298 N.E. 2d 109, 344 N.Y.S. 2d 944 (1973), where the New York Court of Appeals indicated that prompt, probable cause hearings are basic to insuring the due process rights of juveniles.

Petitioners attempt to raise the spectre of disarray among the states so as to convince this Court to grant certiorari "to bring order to the entire field of juvenile detention." Petition at 19. The court below decided a very narrow question that falls far short of broaching issues covering the "entire field of juvenile detention." The issue petitioners seek to raise in this Court is whether juveniles who are arrested without a warrant, denied a right to bail, and detained in a jail or detention center for extended periods have a right to be taken before a judicial officer for a hearing to determine whether there exists probable cause to believe that they have committed the acts for which they have been charged.

Thus, petitioners are unsuccessfully grappling for a reason why this Court should accept certiorari. By not contesting these points until the Supreme Court level, petitioners present issues that are undeveloped and improperly before this Court.

II

**Assuming *Arguendo* That These Issues Are Properly Before This Court, Juveniles Who Are Arrested Without A Warrant, Denied Bail, And Detained For Extended Periods, Are Entitled To A Hearing Before A Judicial Officer To Determine The Existence Of Probable Cause To Believe That They Have Committed The Offense For Which They Have Been Charged And Detained, Whether They Are Accused Status Offenders Or Accused Delinquents.**

Prior to the district court's decision of October 14, 1980 (Appendix A of Petition), children in Missouri could be arrested and detained for extended periods at the unfettered discretion of a juvenile officer or deputy sheriff without ever appearing before a judge. Consequently, many children were mistakenly arrested or held on mere suspicion without one scintilla of evidence to connect them to any wrongdoing being presented until the trial. By that time the liberty deprivation was complete. Probable cause determinations are still not required by Missouri statute or court rule.

### A. Since They Suffer The Same Liberty Deprivation As Accused Delinquents, Accused Status Offenders Should Be Provided The Same Pre-Trial Constitutional Protections.

Although petitioners did not raise the question in the district court, the only issue regarding probable cause that may properly be before this Court is the question of whether juveniles *qua* status offenders, are entitled to the same level of constitutional protection to check the reliability of the decision to detain them as are children charged with delinquent acts. It is important to note that under Missouri law, as in most states, accused status offenders are children charged with non-criminal misbehavior, *e.g.*, truancy, curfew violations, runaway, and incorrigibility.[1] These are offenses emanating from the very status of being a child. Accused delinquents in Missouri are children charged with law violations that are equally applicable to adults, including crimes such as murder, robbery and rape.

As the court below acknowledged, juveniles charged with status offenses are subjected to the same pre-trial deprivation of liberty as are juveniles charged with delinquent offenses: "both accused delinquents and accused status offenders may be put in

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[1] *See* MO. ANN. STAT. §211.031.1(2) (Vernon 1983).

jail pending a judicial hearing on the merits of their cases." *R.W.T.* v. *Dalton*, 712 F. 2d at 1231. The liberty interest at stake is the same for both classes of juvenile suspects—incarceration against one's will. As Justice Powell recognized in *Gerstein* v. *Pugh*, 420 U.S. 103, 125, n. 26 (1975), there are many kinds of pretrial release and many degrees of conditional liberty, "but the key factor is significant restraint on liberty."

Although Missouri distinguishes the two classes of juveniles for dispositional or "sentencing" purposes,[2] there is no distinction in the pre-trial stages of the proceedings; nor is there a difference in the place or conditions of their pre-trial confinement. Accused status offenders as well as children charged with delinquency are subjected to confinement in the same designated facility pursuant to standing order[3] of the juvenile court judges.

Despite the two classes of juveniles having the identical liberty interest at stake, petitioner judges steadfastly submit that the children charged with non-criminal misbehavior should not be as well protected by constitutional safeguards as are the children charged with serious crimes. This makes no sense. As the Eighth Circuit observed below:

> It would be anomalous to afford less protection to children who are accused of acts such as running away, truancy, and the like, which do not present an immediate threat to

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[2] *See*, MO. ANN. STAT. §211.181.2(2)(a) (Vernon 1983), which proscribes the institutional commitment of status offenders for a first offense.

[3] Mo. Sup. Ct. R. 111.03 (West 14th ed. 1983), authorizes that each juvenile court in the state shall by order specify the detention facility or facilities to which juveniles shall be taken when they are within judicial custody, including adult jails. The purpose of the order is to provide guidance and direction to court staff and law enforcement officials concerning where a child shall be held pending adjudication. *See also*, MO. ANN. STAT. §211.151.1 (Vernon 1983).

society, than to children who are accused of acts as murder, robbery, and rape.

Petitioners claim that the court of appeals' reasoning on this point is "extremely disingenuous," and contend that the "reason for the detention of juveniles for such reasons as truancy and running away...may be necessary for the juvenile's own welfare." Respondents do not disagree with this assertion; we merely ask that the court have a minimal probable cause safeguard to help insure for example that the authorities have identified, apprehended and detained the right child, or that a curfew violation, truancy or running away *etc.* has actually been committed.[4]

To advance their argument petitioners eschew the use of the label status "offender," arguing that a better appellation would help make procedures akin to "civil commitment proceedings" labeling juveniles "in need of care and treatment." Petitioners' Argument at 17-18. These state officials have overlooked the legislative recognition of just such a category under Missouri law: MO. ANN. STAT. §211.031.1(1) (Vernon 1983), authorizing juvenile court jurisdiction over children alleged to be "*in need of care and treatment*...or...otherwise without proper care custody or support." (Emphasis added.) As the Eighth Circuit noted, this "class of juveniles is not involved in this case." *R.W.T.* v. *Dalton,* 712 F. 2d at 1231, n. 7.

More importantly, this Court long ago buried petitioners' labeling proposition in *In re Gault,* 387 U.S. 1, 49-50 (1967), and ruled that one must examine the substance of the process; the application of a "civil" label to juvenile proceedings is entirely unrealistic since these proceedings can lead to commit-

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[4] One of the named plaintiffs was arrested at the child's own home—for running away from home. The provision of a prompt probable cause hearing could have easily rectified the mistake and saved the child an extended jail incarceration.

ment to a state institution and, as in the instant case, these proceedings can lead to jail confinement—alongside adult prisoners. Changing the "status offender" label or designating the juvenile court proceeding non-criminal would be to ignore the substance that "commitment is a deprivation of liberty. It is incarceration against one's will whether it is called 'criminal' or 'civil'." 387 U.S. at 50. While the Court in *Gault* was concerned with the Fifth Amendment prohibition against compelling a person to testify against himself, the reasoning of the Court is equally applicable where Fourth and Fourteenth Amendment due process considerations are at issue. *See Heryford* v. *Parker,* 396 F. 2d 393, 396 (10th Cir. 1968).

The Supreme Court has firmly established that this due process probable cause requirement applies to proceedings which "result in the loss of liberty." *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973) (probation revocation); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole revocation). The Court specifically noted that parole-probation revocations mandate constitutional protection, not because they are stages in a criminal prosecution, but because they entail a "loss of liberty." *Gagnon* v. *Scarpelli,* 411 U.S. at 782. Similarly, the court in *Heryford* v. *Parker,* 396 F. 2d at 396, stated as follows:

> It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae,* it has the inescapable duty to vouchsafe due process....

Petitioners cite no authority for their radical proposition that accused status offenders should be accorded fewer constitu-

tional safeguards that accused delinquents. In view of the above-cited weight of authority against their position it is ironic that petitioners would refer to the Eighth Circuit's reasoning as "disingenuous." The undisputed fact that one of the named plaintiffs, a fourteen year-old accused status offender, was detained in an antiquated adult jail—administered primarily by inmate trustees—for periods up to twenty-seven consecutive days without ever being brought before a judicial officer should, if anything, militate in favor of **more** procedural protections, not fewer.

### B. The Fourth Amendment and the Due Process Clause of the Fourteenth Amendment Require that Accused Juveniles be Provided Hearings to Determine the Existence of Probable Cause.

Unlike adults, children arrested and charged with unlawful acts in Missouri are not enitled to bail, sworn petitions or warrants by complainants or validation by attorney-prosecutors obliged to find probable cause. Prior to the district court's order of October 14, 1980, children in petitioners' circuit could be apprehended and locked up for days on mere suspicion or at the whim of a deputy sheriff, juvenile officer or detention facility operator—persons unschooled in jurisprudence—without any findings of fact by an impartial judicial officer as to the existence or lack of probable cause to believe that the children committed the acts for which they were charged. Hence, the procedures applicable to the arrest and pretrial detention of juveniles stand in sharp contrast to the procedures pertaining to adults.[5] Respondents did not seek and the Eighth Circuit did not

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[5] In their complaint respondent juveniles claimed the disparity in pre-trial procedures between adults and juveniles constituted Fourth Amendment, due process and equal protection violations.

establish a panoply of due process protections at the probable cause stage that attend an adjudicatory hearing. Moreover, respondents do not request the same adversarial safeguards for juveniles that are concomitant with an adult's preliminary examination in Missouri.[6]

Citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *Baker* v. *McCollan*,[7] 443 U.S. 137 (1979), petitioners contend that the Eighth Circuit has exceeded constitutional standards by affirming the district court's requirement of a hearing on the issue of

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[6] An adult arrested in Missouri enjoys far greater guarantees against unlawful arrest and incarceration than do children. Under Mo. Sup. Ct. Rules 21.11, 22.06 (West 14th ed. 1983), an adult may not be detained longer than twenty hours unless a capias warrant is issued "[u]pon the filing of a complaint and a finding by the court that sufficient facts have been stated therein to show probable cause that a felony has been committed by the defendant...." Rule 22.03. A judge must also find sufficient facts to support a probable cause determination in the case of an alleged misdemeanant. Rule 21.05. The complaint must be verified by oath of the complainant or authorized by a prosecuting attorney who is ethically bound by the Disciplinary Rules of the Code of Professional Responsibility not to charge any suspect unless the prosecutor is satisfied as to the existence of probable cause. Supreme Court Rules Governing the Missouri Bar and Judiciary Rule 4, DR 7-103(A). *See Gerstein* v. *Pugh*, 420 U.S. 103, 122 n.22 (1975). Felony arrestees are, within a reasonable time, entitled to a preliminary examination replete with adversary safeguards, pursuant to Rule 22.07(c), for the purpose *inter alia* of determining the existence of probable cause. Thus, for adults charged with felonies there is a two-tiered probable cause test prior to extended restraints on their liberty. Moreover, adults, but not juveniles, are entitled to be released on bail pending trial.

[7] Unlike the adult suspect in *Baker*, respondent juveniles in Missouri were never arrested pursuant to a warrant issued by a magistrate on a showing of probable cause.

probable cause for respondent juveniles. Respondents submit that while the Court in *Gerstein* rejected the necessity of adversarial safeguards attendent to probable cause determinations, it did not foreclose the need for a hearing. Petitioners obfuscate the Court's *Gerstein* discussion (420 U.S. at 120) of the low threshold standard for determining probable cause with the nature of the proceeding involved: "By equating the requirements of the Fourth amendment for pre-trial detention with the standards for an arrest, petitioners believe that this Court has indicated that procedures for arrest warrants are all that the Constitution requires." Petitioners' Argument at 14. This reading of *Gerstein* ignores the remaining context of the decision. By holding adversary hearings were not required by the Fourth Amendment, the Supreme Court did not mutually exclude *all* hearings. Respondents assert that a proper reading of *Gerstein* and its progeny compels the conclusion that a probable cause hearing before a judicial officer is a Fourth Amendment prerequisite to continued pretrial detention, especially when there is no state warrant requirement as in the case at bar.

An examination of the precise issues facing the Supreme Court in *Gerstein* is important:

> As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause *for detention*, and if so, whether the *adversary hearing* ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

420 U.S. at 111 (Emphasis supplied). Justice Powell, writing for the majority, went on to hold that while a probable cause determination by a judicial officer was required under the Fourth Amendment for continued detention, such a determination need not be the product of an *adversary* hearing.[8] Clearly,

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[8] Respondents concede that an adversary probable cause hearing is not required by the Fourth Amendment, however, this does not negate the requirement of a nonadversary proceeding at which the suspect makes an appearance before a magistrate.

however, the Supreme Court did intend a probable cause hearing procedure, even though it may be nonadversarial in nature.

The confusion in connection with the issue addressed herein is engendered by the failure of the petitioners to differentiate between the *standard* for continued pretrial detention and the *procedures* for concluding that the standard has been met. *Gerstein* never once stated that the issue of an arrest warrant alone was a sufficient *procedure* to justify continued pretrial detention. The Court merely indicated that the *standards* for arrest and continued detention were the same:

> The sole issue [to be decided] is whether there is probable cause *for detaining the arrested person* pending further proceedings. This issue can be determined reliably without an adversary hearing. *The standard is the same as that for arrest.* That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided in a nonadversary proceeding on hearsay and written testimony,...

420 U.S. at 120 (Emphasis supplied.) This language clearly recognizes that while the standards for arrest and continued detention are the same, there are two different procedures for determining whether the standard has been met—the *ex parte* arrest warrant and some type of probable cause hearing.

The Court's approval of the nonadversary proceeding to determine probable cause for continued detention clearly does not condone such continued detention solely on the basis of an *ex parte* determination akin to an arrest warrant.[9] This becomes particularly important in this action since there is no arrest warrant issued for juveniles in Missouri. The core of petitioners'

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[9] That "the prosecutor's official oath [in an information] could not furnish probable cause,..." was the essence of the holding in *Gerstein*, 420 U.S. at 117. *See also, Albrecht* v. *United States*, 273 U.S. 1, 5 (1927).

argument is that a probable cause determination by a layman juvenile officer and communicated *ex parte* to a juvenile court judge for his imprimatur is sufficient to pass constitutional muster. It is important to note that juvenile court orders authorizing continued detention entered by petitioner judges did not reflect a finding of probable cause to believe that the child has committed the offense. *See Application of Roberts,* 622 P.2d 1094, 1097-98 (Ore. 1981).

While the standards for arrest and continued detention are the same, there is at least one critical difference in the two procedures—the issuance of an arrest warrant is a summary, *ex parte* procedure affording the suspect no opportunity to rebut a clearly erroneous finding of probable cause for continued detention. Indeed, Justice Powell in *Gerstein,* commenting upon the balance between the rights of the individual and the legitimate interests of law enforcement, noted that the need to rely upon such *summary* action diminishes after the suspect is in custody:

> Once the suspect is in custody, . . . [t]here no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for *summary* action subside, the suspect's need for a neutral determination of probable cause increases significantly.

420 U.S. at 114. (Emphasis added). Since children are entitled to a higher standard of care than is afforded adults, and since "[p]retrial detention is an onerous experience, especially for juveniles," this balance between individual rights and the interests of law enforcement tips even more heavily in favor of the child once he is in custody. *Moss* v. *Weaver,* 525 F.2d 1258, 1260 (5th Cir. 1976). *See also, In re Gault,* 387 U.S. 1 (1967); *Kent* v. *United States,* 383 U.S. 541 (1966); *D.B.* v. *Tewksbury,* 545 F.Supp. 896 (D. Ore. 1982); *Swansey* v. *Elrod,* 386 F. Supp. 1138 (N.D. Ill. 1975); *Baker* v. *Hamilton,* 345 F. Supp. 345 (W.D. Ky. 1972).

Also of import to the present issue is this Court's treatment of the practical consequences of its holding in *Gerstein:*

> Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, *and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole.* While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the *suspect's first appearance before a judicial officer,* [footnote and citation omitted], or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release.

420 U.S. at 123-24 (Emphasis supplied). It is significant that every procedural option identified by the Court for determining probable cause to detain involves a *hearing* before a judicial officer—nowhere does the Court specifically mention the issuance of an arrest warrant, standing alone, as a satisfactory procedure for continued pretrial detention.

Following this Court's pronouncement in *Gerstein* and turning to Missouri's pretrial procedures for juveniles, it is inescapable that, "viewed as a whole," those procedures require a determination of probable cause at the detention hearing mandated by Mo. Sup. Ct. R. 111.07 (West 1983). It is readily apparent under the teaching of *Gerstein* that a determination of probable cause dovetails perfectly with Missouri's detention hearing procedure. Significantly, a determination of probable cause at the statutory detention hearing, *i.e.*, "the suspect's first appearance before a judicial officer," was specifically approved in *Gerstein*. *See* 420 U.S. at 123, n. 24.

Likewise, in *Moss* v. *Weaver,*[10] 525 F.2d 1258 (5th Cir. 1976), the Fifth Circuit, relying extensively on *Gerstein,* proceeded on the explicit assumption that probable cause to believe a child has committed an offense should be determined at a "pretrial hearing." 525 F.2d at 1260-61. The *Moss* opinion contains repeated references to such hearings. It is important to remember, however, that *Moss* and *Gerstein* dealt solely with the Fourth Amendment. Respondents' complaint implicates the Due Process Clause as well as the Fourth Amendment.

As the Eighth Circuit recognized, "requiring juvenile courts to hold probable cause hearings will not impinge on their ability to function in a "unique manner." *R. W. T.* v. *Dalton,* 712 F.2d at 1230. The court below went on to string-cite a large number of examples of decisions by courts that have acknowledged "that probable cause hearings are fundamental to juveniles' rights to due process." *Id.* (Citations omitted.) In view of the virtual unanimity in support of this procedural safeguard for juveniles among the state and federal courts and commentators[11] that have addressed this issue, and the vast majority of

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[10] In response to the court's decision in *Moss* v. *Weaver,* 525 F.2d 1258 (5th Cir. 1976), the Florida Court Rules governing detention of juveniles were amended to require a probable cause determination. The Rules now provide that a juvenile "be given a detention hearing within 24 hours of his being taken into custody, excluding Sundays and legal holidays, to determine the existence of probable cause to believe that the child has committed such delinquent act or violation of law and the need for continued detention." FLA. STAT. ANN. §39.032(2)(7) (Supp. 1982).

[11] *See* ABA & INST. JUD. ADMIN. JUV. JUST. STANDARDS PROJ. PRETRIAL CT. §4.1 and INTERIM STATUS, §7.6 (Ballinger, 1980). Both volumes endorse the concept of a prompt, judicial finding of probable cause with adversarial safeguards; they were adopted by the ABA House of Delegates in February, 1979.

states that have codified this safeguard via statute or court rule,[12] petitioners' claim of disorder in this area of law is preposterous.

III

**Petitioners Should Not Be Granted Certiorari To Review Immunity Issues That Were Decided In Their Favor.**

In part II of petitioners' argument, they urge this Court to consider the question of whether "judicial officers, acting in a judicial capacity, are immune from declaratory and injunctive relief." While the district court granted such relief, the Eighth Circuit specifically reversed that holding, ruling in favor of the petitioners on the issue.

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[12] E.g., ALASKA STAT. §47.10.140(c) (1979); ARIZ. JUV. CT. R.P. 3(b); ARK. STAT. ANN. *§45-421(d) (Supp. 1983); D.C. CODE* §16-2312(e),(f) (1981); FLA. R. JUV. P.R. 8.050(f); ILL. ANN. STAT. ch. 37, §703.6 (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. §31-6-4-5(g) (Burns Supp. 1983); IOWA CODE ANN. §232.44(4) (West Supp. 1983-1984); KY. REV. STAT. §208.192(4)(a)(1982); ME. REV. STAT. ANN. tit. 15, §3203(5)(D) (1980); MISS. CODE ANN. §43-21-309(4)(a) (1981); NEB. REV. STAT. §43-256 (Supp. 1982); N.H. REV. STAT. ANN. §169-B:14 (Supp. 1981); N.J. STAT. ANN. §2A:4A-38(i) (West Supp. 1983-1984); N.M. R. P. CHILDREN'S CT. R.; N.Y. FAM. CT. ACT §307.4(7) (Family Ct. Act, Ch. 920, 1982 N.Y. Laws §1); OR. REV. STAT. §419.577(3) (1981); 42 PA. CONS. STAT. ANN. §6332 (Purdon 1982); R.I. GEN. LAWS §14-1-11 (Supp. 1982); TENN. CODE ANN. §37.214(a)(1) (Supp. 1983); WASH. REV. CODE ANN. §13.40.040(2)(a) (Supp. 1983-1984); W. VA. CODE §49-5-9(a) (Supp. 1983); WIS. STAT. ANN. §48.21(a) (West Supp. 1983-1984). In New Jersey, New Mexico, New York, Rhode Island and West Virginia, the probable cause finding need not be made at the initial detention hearing, but must be made shortly thereafter if the child is continued in custody. A variation of probable cause, *e.g.*, reasonable cause, is required in four states. CAL. JUV. CT. R. 1326(a) (prima facie case); CONN. GEN. STAT. ANN. §46b-131 (West Supp. 1983-1984); LA. CODE JUV. PRO. ANN. art. 40 (West Sp. Pamphlet 1983); N.C. GEN. STAT. §7A-574 (1981); MINN. R. JUV. P. §18.06 (5A 1983).

In essence, petitioners ask this Court to review an issue decided in their favor. For this Court to approve a petition for certiorari sought by a prevailing party is inconsistent with this Court's settled refusal to entertain appeals by parties who have been successful in obtaining final judgments in the lower courts. *See e.g., Public Service Commission of Missouri,* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939); *Perez* v. *Ledesma,* 401 U.S. 82, 87 (1971). Petitioners seek to cloud their status as prevailing parties on this issue by introducing two sub-issues. First, they raise a question not presented to either the district court or the Eighth Circuit: is the juvenile officer who initiates detention acting as an arm of the court and, hence, also immune to injunctive relief?[13]

While this Court is not precluded from deciding issues not presented to lower courts, it has generally been reluctant to do so unless interests of judicial administration will be served by such action. *Carlson* v. *Green,* 446 U.S. 14 (1980). Such is not the situation in the case presented to this Court.

In Missouri, the juvenile officer plays a hybrid role in the justice system. While subject to hiring and firing by the juvenile court judge, MO. ANN. STAT. §211.351 (Vernon 1983), the juvenile officer performs many functions that have traditionally been encompassed by the executive branch. It is the juvenile officer who is empowered, like any law enforcement agent, to take a child into custody. MO. ANN. STAT. 211.401.2. The juvenile officer may authorize detention, Mo. Sup. Ct. R. 111.04, and decide whether charges will be filed against the youth. Mo. Sup. Ct. R. 111.08, 113.04.

This hybrid role, established by Missouri statute and court rule, is not found in every state. Therefore the issue of the rela-

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[13] Note that the juvenile officer has not joined in this petition for certiorari and is not represented by the Missouri Attorney General's Office.

tionship of the juvenile officer to the juvenile court judge is strictly limited to the facts of this case. In addition, this unique role serves to differentiate the juvenile officer from the clerk of the court for purposes of determining whether his or her actions can be clothed in judicial immunity. The juvenile officer must function independently of the judge in order to avoid due process violations that would occur if the judge attempted to control his or her executive branch functions. For these reasons, this issue is not the important, recurring kind such as would typically cause this Court, consistent with its decision in *Carlson* 446 U.S. at 17, n. 2, to abandon its standard rule of refusing to review those issues that have been raised for the first time pursuant to certiorari. *United States* v. *Ortiz,* 422 U.S. 891 (1975).

The second sub-issue that petitioners interject into their argument that this Court should reevaluate and affirm the Eighth Circuit's conclusion that declaratory and injunctive relief do not lie against the state circuit judges on the issue of probable cause is that of the award of attorneys' fees against the state. The petitioners contend that this is an award against the judges and hence tied to the question of immunity. The Eighth Circuit clearly implicated the juvenile officer in his official capacity in the probable cause practice complained of in the lower courts. Thus they found an award of attorneys' fees against this state employee to be appropriate.

Notwithstanding their dispute with the award of attorneys' fees in the lower courts, the petitioners do not raise this issue prior to consideration by this Court. For this reason and for the reasons stated *supra,* this Court should not address the question as raised by the petitioners.

## IV

**The District Awarded And The Eighth Circuit Affirmed The Correct Allocation Of Attorneys' Fees Against The Parties.**

Petitioners misrepresent the application of *Hensley* v. *Eckerhart,* ____U.S.____, 103 S. Ct. 1933 (1983), when they

claim that the district court's allocation of the attorney's fee award between various defendants is in "direct contravention" of *Hensley* (Petition for Writ of Certiorari, at 32). *Hensley* dealt with the issue of proper computation of a fee award in cases in which plaintiffs prevail on some claims, but fail to prevail on other claims which are distinct and unrelated to the successful claims. This Court held that in such cases, no fee award should be made for work done on the district and unrelated claims. Since this Court ruled that the lower court had not properly evaluated the fee application, it remanded the case for redetermination and possible reduction of the award. *Id.* at 1943.

In the present case, petitioners claim to be dissatisfied not with the amount of the award, but with the allocation of liability among the losing parties. *Hensley,* however, does not deal with the issue of the allocation of responsibility for a fee award between unsuccessful defendants. It is therefore incorrect to say that the district court's allocation of the fee award is "inconsistent with" or in "direct contravention" of *Hensley*.

In an attempt to make this case somehow fit the *Hensley* mold, petitioners construct a false dichotomy among the defendants and issues: state defendants being responsible for the probable cause issue and consequent attorneys' fees; local officials being liable for the jail conditions. Petitioner state juvenile court judges seek a redetermination of liability for the fees in accord with the dichotomy. The problem with this neat division of responsiblity is that it fails to take into account the applicable state law.

The petitioner juvenile court judges and juvenile officers are just as responsible, if not more so, for the "local" jail conditions as are the sheriffs and county fiscal courts. First, the petitioner state circuit judges and their delegates are responsible for the selection and designation by standing court order of facilities for the pre-trial detention of children. Mo. Sup. Ct. R. 111.03 (West pamphlet 1983). Second, once they have designated the facility, petitioners' authority over conditions of

confinement does not subside but is codified in specific detail by the Missouri Legislature. MO. ANN. STAT. §211.011, (Vernon 1969), provides, in part, that:

> each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

To this end, the juvenile court, defined by MO. ANN. STAT. §211.021 as the juvenile division of the circuit court for the county, is authorized to order confinement of a juvenile in a jail or other adult detention facility only if his conduct makes him a menace to himself or others and he is placed in a "room or ward entirely separate from adults confined in [the same facility]." MO. ANN. STAT. §211.021. MO. ANN. STAT. §211.331, provides, in part, that:

> [t]he place of detention shall be so located and arranged that the child being detained does not come in contact, at any time or in any manner, with adults convicted or under arrest, and the care of children in detention shall approximate as closely as possible the care of children in good homes.

The same section gives the juvenile court judge the power to appoint a superintendent and other personnel necessary to operate the detention facility and to fix their salaries and maintenance.[14] Further, §211.341(2), prescribes, in part, that:

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[14] *See Anderson* v. *St. Louis County*, 421 S.W.2d 249 (Mo. banc 1967) (county officials may not change budget estimates for the number of juvenile court employees without first obtaining consent of juvenile court).

> (c)ircuit judges of any two or more adjoining judicial circuits . . . may . . . establish one place of juvenile detention to serve their respective judicial circuits. In such event, *the circuit judges so agreeing shall jointly govern the affairs of the place of detention.* . . . (Emphasis added.)

Given the statutory framework embodied in the Missouri juvenile code, it is clear that the petitioner state juvenile court judges' duty toward a juvenile confined in an adult facility does not terminate when the judge designates a place of detention. The statutes unequivocally require that petitioners ensure that every detained juvenile have no contact with adult inmates. This was one of the primary issues regarding conditions in the trial court and the main impetus for the Consent Judgment barring the use of the two jails in question. The other conditions issue concerned the filthy, dangerous and draconian circumstances of the jails. Yet the juvenile code entitles children to care which approximates the care of children in good homes. MO. ANN. STAT. §211.011 prescribes that the foregoing provisions are to be interpreted liberally so that juveniles will receive this standard of care for the entire period they are under the jurisdiction of the juvenile court. These provisions support the proposition that the petitioner juvenile court judges must exercise continuing supervision over the conditions of confinement in juvenile detention facilities. This continuing duty to supervise conditions is also evident from the court's express power to appoint the supervisor and staff for such a facility. MO. ANN. STAT. §211.311. The power to appoint and determine salaries implies that the petitioner juvenile court judges are ultimately responsible for the actions of the officer appointed to operate the facility. The power is also evident from §211.341.(2), quoted above, which gives circuit judges who designate a joint juvenile detention facility the joint duty to govern its affairs. To hold that the juvenile judge has a continuing duty of supervision only when a joint facility is involved would require this Court to ignore the statutory admonition that the provisions be interpreted liberal-

ly. Moreover, the statutes require the juvenile judge to supervise the conditions in the juvenile detention facility on a continuing basis. Thus, it cannot be said that the petitioner state judges and the respondent juvenile officers are not liable in attorneys' fees for the conditions aspect of the case.

Even if *Hensley* was somehow relevant to the present case, it would not require reversal of the fee award. Petitioners have not contended that the juvenile respondents (plaintiffs below) failed to prevail on any claims distinct from and unrelated to their successful claims, or that they failed to achieve a level of success which would make their hours reasonably expended a satisfactory basis for making a fee award.

In addition, the fee award as allocated by the Eighth Circuit does not run against the state because of any holding against petitioners (the state court judges). The injunction against the petitioner judges was vacated. The award remains against the state because the injunction was upheld as to the juvenile officer, also a state official, but not a petitioner herein. Because the award was made against the state through the juvenile officer, it is difficult to understand how the petitioner state court judges can claim to be aggrieved.

In essence, petitioners are trying in a belated and indirect fashion to attack the amount of the award. Although they purport to complain merely of the award's allocation, their true interest is revealed in their statement, "In the instant case, there was no finding on what amount of time plaintiffs' counsel expended on the probable cause issue, *much less whether or not that amount of time was reasonable.*" Petition for Writ of Certiorarti, at 32 (emphasis added). The Eighth Circuit noted that "[t]here is no complaint on appeal that the amount of the fee award was excessive." *R.W.T.* v. *Dalton*, 712 F.2d 1225, 1234 (1983) Petitioners should not be heard to make that complaint now, directly or indirectly, by asserting that *Hensley* applies to this case.

## CONCLUSION

For the foregoing reasons, respondent juveniles respectfully pray that this Court deny the petition for certiorari.

Respectfully submitted,

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